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625
No. 12491

United States
Court of Appeals
for the Ninth Circuit.

PICKERING LUMBER CORPORATION, a corporation,

Appellant,

vs.

THE AMERICAN INSURANCE COMPANY,
et al.,

Appellees.

Transcript of Record
In Two Volumes
Volume I
(Pages 1 to 288)

Appeal from the United States District Court,
Northern District of California,
Southern Division.

FILED

APR 25 1950

PAUL P. O'BRIEN,

CLERK

No. 12491

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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San Francisco, California,

Attorneys for Plaintiffs and Appellees.

In the District Court of the United States for the
Northern District of California, Southern
Division

No. 27299 H

THE AMERICAN INSURANCE COMPANY;
ATLAS ASSURANCE COMPANY LIM-
ITED; CALEDONIAN INSURANCE COM-
PANY; THE CAMDEN FIRE INSURANCE
ASSOCIATION; COLUMBIA INSURANCE
COMPANY OF NEW YORK; COMMER-
CIAL UNION ASSURANCE COMPANY,
LIMITED; THE CONTINENTAL INSUR-
ANCE COMPANY; FIRE ASSOCIATION
OF PHILADELPHIA; FIREMAN'S FUND
INSURANCE COMPANY; FIREMEN'S IN-
SURANCE COMPANY OF NEWARK, NEW
JERSEY; GLENS FALLS INSURANCE
COMPANY; GLOBE AND RUTGERS FIRE
INSURANCE COMPANY; GREAT AMERI-
CAN INSURANCE COMPANY; THE HAN-
OVER FIRE INSURANCE COMPANY;
HARTFORD FIRE INSURANCE COM-
PANY; THE HOME INSURANCE COM-
PANY; INSURANCE COMPANY OF
NORTH AMERICA; NATIONAL FIRE IN-
SURANCE COMPANY OF HARTFORD;
NATIONAL LIBERTY INSURANCE COM-
PANY OF AMERICA; NATIONAL UNION
FIRE INSURANCE COMPANY OF PITTS-
BURG, PA.; NEW HAMPSHIRE FIRE
INSURANCE COMPANY; NEW YORK

UNDERWRITERS INSURANCE COMPANY; NEW ZEALAND INSURANCE COMPANY, LIMITED; THE NORTHERN ASSURANCE COMPANY LIMITED; NORWICH UNION FIRE INSURANCE SOCIETY LIMITED; PEARL ASSURANCE COMPANY, LIMITED; THE PENNSYLVANIA FIRE INSURANCE COMPANY; QUEEN INSURANCE COMPANY OF AMERICA; ST. PAUL FIRE & MARINE INSURANCE COMPANY; SCOTTISH UNION AND NATIONAL INSURANCE COMPANY; SECURITY INSURANCE COMPANY, OF NEW HAVEN; SPRINGFIELD FIRE AND MARINE INSURANCE COMPANY; THE TRAVELERS FIRE INSURANCE COMPANY; UNITED STATES FIRE INSURANCE COMPANY; WESTCHESTER FIRE INSURANCE COMPANY; THE WESTERN ASSURANCE COMPANY; all corporations,

Plaintiffs,

vs.

PICKERING LUMBER CORPORATION, a corporation,

Defendant.

COMPLAINT FOR DECLARATORY RELIEF

Plaintiffs allege:

I.

The jurisdiction of this Court arises out of the fact that the parties are citizens of different states,

and the amount in controversy is in excess of \$3000.00 exclusive of interest and costs; this is a suit brought pursuant to the Federal Declaratory Judgment Act (28 USC 400), in a case of actual controversy between plaintiffs and defendant; all as more fully hereinafter appears.

II.

Each of the plaintiffs is a corporation incorporated under the laws of a state of the United States other than the State of Delaware, or under the laws of a foreign country, as follows:

Name of Plaintiff and Where Incorporated: The American Insurance Company, New Jersey; Atlas Assurance Company Limited, Great Britain; Caledonian Insurance Company, Great Britain; The Camden Fire Insurance Association, New Jersey; Columbia Insurance Company of New York, New York; Commercial Union Assurance Company, Limited, Great Britain; The Continental Insurance Company, New York; Fire Association of Philadelphia, Pennsylvania; Fireman's Fund Insurance Company, California; Firemen's Insurance Company of Newark, New Jersey, New Jersey; Glens Falls Insurance Company, New York; Globe and Rutgers Fire Insurance Company, New York; Great American Insurance Company, New York; The Hanover Fire Insurance Company, New York; Hartford Fire Insurance Company, Connecticut; The Home Insurance Company; New York; Insurance Company of North America, Pennsylvania;

National Fire Insurance Company of Hartford, Connecticut; National Liberty Insurance Company of America, New York; National Union Fire Insurance Company of Pittsburg, Pa., Pennsylvania; New Hampshire Fire Insurance Company, New Hampshire; New York Underwriters Insurance Company, New York; New Zealand Insurance Company, Limited, New Zealand; The Northern Assurance Company, Limited, Great Britain; Norwich Union Fire Insurance Society Limited, Great Britain; Pearl Assurance Company, Limited, Great Britain; The Pennsylvania Fire Insurance Company, Pennsylvania; Queen Insurance Company of America, New York; St. Paul Fire & Marine Insurance Company, Minnesota; Scottish Union and National Insurance Company, Great Britain; Security Insurance Company, of New Haven, Connecticut; Springfield Fire and Marine Insurance Company, Massachusetts; The Travelers Fire Insurance Company, Connecticut; United States Fire Insurance Company, New York; Westchester Fire Insurance Company, New York; The Western Assurance Company, Canada.

Each of the plaintiffs is now and for many years past continuously has been engaged in business as an insurance underwriter in and by authority of the several states of the United States, including the State of California; the principal office of each of the plaintiffs in the State of California is located at San Francisco, California; and in the case of plaintiff Fireman's Fund Insurance Company, a

California corporation as aforesaid, the principal office of said plaintiff is located at San Francisco, California.

III.

Defendant is a corporation incorporated under the laws of the State of Delaware. Defendant is now and for many years past continuously has been engaged in business in the State of California, carrying on sawmill, box factory, and timber operations in said State of California. Defendant has heretofore designated a resident of the State of California as agent for service of legal process; and plaintiffs are informed and believe and therefore allege that several of its principal corporate and managing officers are and for some time have been residents of the State of California.

IV.

On or about 30 April 1945 each of the plaintiffs did, in California, issue and deliver to defendant its policy (or policies) of insurance known as use and occupancy or business interruption insurance, insuring defendant against actual loss sustained by reason of suspension of business resulting from damage by fire to certain properties of defendant located in the State of California, for a term of one year from and after 30 April 1945, and upon the provisions of and subject to the terms and conditions contained in said policies of insurance. A copy of the policy of insurance so issued by plaintiff The Home Insurance Company is attached hereto, marked Exhibit "A" and Exhibit

“B”, and made a part hereof; each of the policies issued by plaintiffs is substantially identical in form and substance to the policy issued by plaintiff The Home Insurance Company, copy of which is attached hereto as aforesaid. The identifying number of and the amount of insurance provided for (as of 7 July 1945) in each of the policies so issued by plaintiffs is as follows:

Name of Plaintiff and Number of Policy	Amount
The American Insurance Company (027885)	\$ 5,000
Atlas Assurance Company Limited (S-705012)	20,000
Caledonian Insurance Company (134336)	38,750
The Camden Fire Insurance Association (834784)	17,500
Columbia Insurance Company of New York (400443)	8,000
Commercial Union Assurance Company, Limited (923047)	25,000
The Continental Insurance Company (645621)	25,000
Fire Association of Philadelphia (PF-63798)	10,000
Fireman's Fund Insurance Company (A-34562)	17,000
Firemen's Insurance Company of Newark, New Jersey (29455)	15,000
Glens Falls Insurance Company (PCF-448625)	40,000
Globe and Rutgers Fire Insurance Company (38917)	5,000
Great American Insurance Company (56134)	20,250
The Hanover Fire Insurance Company (148251)	10,000
Hartford Fire Insurance Company (198018)	10,000
The Home Insurance Company (16517)	15,000
Insurance Company of North America (338100)	7,500
(Same) (OU-457353)	15,000
National Fire Insurance Company of Hartford (238990) ..	32,625
National Liberty Insurance Company of America (347379)	16,800
National Union Fire Insurance Company of Pittsburg, Pa. (118314)	15,000
New Hampshire Fire Insurance Company (41378)	30,000
New York Underwriters Insurance Company (137856)	20,000
New Zealand Insurance Company, Limited (133093)	25,000
The Northern Assurance Company Limited (U-111058) ..	32,125
Norwich Union Fire Insurance Society Limited (93876) ..	12,500
Pearl Assurance Company, Limited (655548)	10,000
The Pennsylvania Fire Insurance Company (249446)	15,000
Queen Insurance Company of America (Q-86515)	32,750

St. Paul Fire & Marine Insurance Company (149178)	5,000
Scottish Union and National Insurance Company (F-62436)	5,000
Security Insurance Company, of New Haven (112553).....	25,000
Springfield Fire and Marine Insurance Company (283551)	10,000
The Travelers Fire Insurance Company (205026)	17,500
United States Fire Insurance Company (CL-52793)	20,200
Westchester Fire Insurance Company (544918)	15,000
The Western Assurance Company (CL-3679)	7,500

The total amount of insurance provided for (as of 7 July 1945) in and by all of the said policies in the aggregate is the sum of \$651,000. Plaintiffs are informed and believe and therefore allege that at the time of the fire hereinafter referred to defendant carried no use and occupancy or business interruption insurance other than or in addition to the said policies issued by plaintiffs.

V.

On 7 July 1945 a fire damaged the properties referred to in said policies, and caused a suspension of business by and a loss to defendant.

VI.

On or about 22 March 1946, at the request of defendant, plaintiffs and each of them made an advance payment to defendant on account of said fire and loss, pending ascertainment of the amount of said loss. Said advance payment was in the aggregate amount of \$250,000, and the amount paid by each plaintiff to defendant is as shown in Column (C) of Exhibit "C" attached hereto and made a part hereof.

VII.

From time to time following the said fire, at the request of defendant, plaintiffs extended the time for filing proofs of loss under the said policies of insurance; within the time as so extended and on or about 24 January 1947 defendant made and delivered to plaintiffs its proof of loss in the form of a document entitled "Final Proof of Loss" directed to each and all of plaintiffs. In said document defendant made claim against plaintiffs for an alleged loss in the total amount of \$742,004.41; and defendant therein demanded payment from each plaintiff of an amount equal to the face amount of its respective policy (or policies) as shown in Column (A) of Exhibit "C" attached hereto, and made a part hereof, plus interest, less the amount of the advance payment made to defendant by each plaintiff as alleged in paragraph VI hereinabove and as shown in Column (C) of said Exhibit "C". The amount so demanded by defendant from each plaintiff, even after deduction of the advance payment made by each, and exclusive of interest and costs, was and is in excess of the sum of \$3000.00 as to each plaintiff.

VIII.

On or about 27 January 1947, and within the time provided by said policies of insurance, plaintiffs notified defendant in writing that the said proof of loss was defective in the particulars specified in the notice, and requested that the defects be remedied by verified amendments. On or about 6

February 1947 defendant made and delivered to plaintiffs its reply to the said notice in the form of a document entitled "Reply Affidavit".

IX.

On or about 10 February 1947, and within the time provided by said policies of insurance, plaintiffs notified defendant in writing of their total disagreement with the amount of loss claimed by defendant, and of the amount of loss plaintiffs admitted on each of the different articles or properties set forth in the said proof of loss and in the said "Reply Affidavit", all in accordance with the provisions of the said policies of insurance.

X.

Plaintiffs and defendant failed to agree within ten days after the notice of disagreement referred to in paragraph IX hereinabove, as to the value of the subject of insurance and the amount of loss. On or about 21 February 1947, and within the time provided by said policies of insurance, plaintiffs demanded in writing an appraisement, and named a competent and disinterested appraiser. Defendant thereupon appointed a competent and disinterested appraiser. The two appraisers so chosen, before commencing the appraisement, selected a competent and disinterested umpire.

XI.

Thereafter the appraisers and umpire entered upon the said appraisement pursuant to the pro-

visions of said policies of insurance. On or about 18 April 1947 the appraisers requested plaintiffs and defendant to extend until 3 May 1947 the time for completion of the appraisal, and plaintiffs and defendant consented in writing to such extension of time. By written award dated 1 May 1947, duly signed and verified by the two appraisers and by the umpire, the values and loss were estimated, ascertained, and appraised, and the sound value and damage were separately stated, all in accordance with the provisions of the said policies of insurance, as follows:

(1) The net profits prevented and fixed charges and continuing expenses during the period from 8 July 1945 to 7 April 1946, reduced by profits realized and fixed charges and continuing expenses recovered by partial operation following the fire, were fixed at the amount of \$581,000;

(2) The net profits prevented and charges and expenses which would normally have been earned during the period of twelve months immediately following the fire were fixed at the amount of \$1,030,000.

(3) The expenses incurred by defendant, other than those constituting costs of partial operations, for the purpose of reducing the loss, were fixed at the amount of \$1,760.

XII.

By application of the provisions of the said policies of insurance to the said ascertainment by

appraisal award the aggregate amount payable to defendant by plaintiffs pursuant to the provisions of the said policies of insurance is the sum of \$491,379.41; and the amount payable by each plaintiff under and by virtue of said ascertainment and said provisions is that proportion of \$491,379.41 which the face amount of each of the said policies bears to the aggregate face amount of all of said policies, as shown in Column (B) of Exhibit "C" attached hereto and made a part hereof. Between on or about 26 May 1947 and 28 May 1947, and within the time provided by said policies of insurance, each plaintiff tendered to defendant the full amount payable by it respectively, as aforesaid, less the amount of the advance payment theretofore made by each plaintiff as aforesaid; said amounts so tendered by each plaintiff are as shown in Column (D) of Exhibit "C" attached hereto and made a part hereof.

XIII.

Between on or about 29 May 1947 and 31 May 1947 defendant rejected, refused, and returned each and every such tender made by plaintiffs as aforesaid. Defendant has asserted and continues to assert to plaintiffs that defendant will not concede or accept the validity of the said appraisal award and that it intends to "dispute" such validity; and defendant further claims to be entitled to receive from each plaintiff individually and from all plaintiffs in the aggregate an amount or amounts substantially in excess of the amounts so tendered as aforesaid.

Plaintiffs are not aware of the exact amount or amounts now claimed by defendant, but are informed and believe and therefore allege that the amount or amounts now claimed are not less than the claim made by defendant in its said proof of loss, as alleged in paragraph VII hereinabove, namely, as to each plaintiff an amount equal to the face amount of its respective policy (or policies), plus interest, less the amount of the said advance payments.

XIV.

The amounts heretofore paid and tendered by plaintiffs as hereinabove alleged were and are, as to each plaintiff individually and as to all plaintiffs in the aggregate, the full amounts to which defendant was and is entitled under and by virtue of the said policies of insurance. The appraisal award, by virtue of which the said amounts were determined as aforesaid, was and is valid and binding on both plaintiffs and defendant.

XV.

In the alternative, and in event the Court should decree that the said appraisal award is invalid, then plaintiffs are entitled to have this Court determine and fix the amount of loss and damage suffered by defendant by reason of said fire and the proportionate liability of each plaintiff to defendant under and by virtue of the said policies of insurance and all the provisions thereof. And in such event, plaintiffs allege that said appraisal award was

and is liberal in the amounts thereby determined, and that the loss and damage suffered by defendant as a result of said fire within the contemplation and coverage of said policies of insurance was and is in fact substantially less than the amounts fixed in and determined by the said appraisal award.

XVI.

Plaintiffs further allege that defendant is threatening to and will, unless restrained, institute separate actions upon each of said policies of insurance, which would necessitate the defense by plaintiffs of a multitude of suits and the danger of having the amount of loss and liability established in varying amounts in the different actions instituted by defendant; plaintiffs have no clear and adequate remedy at law, and there is no clear and adequate remedy at law, which will properly protect the rights of plaintiffs in the premises. Plaintiffs therefore allege that this Court should upon hearing enjoin and restrain defendant from instituting or prosecuting any action in any other court upon the various policies of insurance involved herein, and require defendant to set up its claim under each and all of the said policies in this action; and upon a final hearing in this cause a permanent injunction should be granted.

Wherefore, plaintiffs demand that the Court adjudge:

(1) That the said appraisal award is valid and binding upon the parties hereto, and that the amount

payable by each plaintiff to defendant is the amount heretofore tendered by each plaintiff as alleged in this complaint and as shown in Column (D) of Exhibit "C" attached hereto;

(2) That should the Court decree otherwise than as prayed in the preceding paragraph hereof, the Court determine the amount to which defendant is entitled from each plaintiff under and by virtue of the provisions of the said policies of insurance referred to in this complaint;

(3) That plaintiffs recover their cost of suit herein;

(4) That plaintiffs have such other and further relief as the Court may deem proper.

BERT W. LEVIT,
LONG & LEVIT,

By /s/ BERT W. LEVIT,
Attorneys for Plaintiffs.

State of California,
City and County of San Francisco—ss.

R. H. Griffith, being first duly sworn, deposes and says: that he is an officer, to wit, Vice-President of Glens Falls Insurance Company, a corporation, one of the plaintiffs named in the foregoing complaint, and as such makes this verification for and on behalf of said corporation; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on informa-

tion or belief, and as to those matters he believes it to be true; that he makes this verification on behalf of all plaintiffs named in the foregoing complaint.

/s/ R. H. GRIFFITH.

Subscribed and sworn to before me this 13th day of June 1947.

[Seal] By /s/ KATHRYN E. STONE,
Notary Public in and for the City and County of
San Francisco, State of California.

EXHIBIT A

California Standard Form Fire Insurance Policy
No Other Insurance Permitted Except by Agree-
ment Endorsed Hereon or Added Hereto
Stock Company

No. 16517

Renewal of No. 15222

Amount \$15,000.00

Rate @ 3.298. Prem. \$494.70

The Home Insurance Company [Seal]
of New York
Organized 1853.

In Consideration of the Stipulations herein
named and of four hundred ninety four and 70/100
dollars premium, does insure Pickering Lumber

Exhibit A—(Continued)

Corporation, as now or may hereafter be constituted, for account of whom it may concern, for the term of One Year from the Thirtieth day of April, 1945, at noon, to the Thirtieth day of April, 1946, at noon, against all loss or damage by fire, except as hereinafter provided, to an amount not exceeding Fifteen Thousand and 00/100 Dollars to the following described property while located and contained as described herein, and not elsewhere, to wit: As per slip hereto attached:

(Note: For copy of "slip hereto attached," see Exhibit "B.")

The company will not be liable beyond the actual cash value of the interest of the insured in the property at the time of loss or damage nor exceeding what it would then cost the insured to repair or replace the same with material of like kind and quality; said cash value to be estimated without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating repair or construction of buildings, and without compensation for loss resulting from interruption of business or manufacture.

This policy is made and accepted subject to the foregoing stipulations and conditions and those hereinafter stated, which are hereby specially referred to, and made part of this policy, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto,

Exhibit A—(Continued)

and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except by writing endorsed hereon or added hereto, and no person, unless duly authorized in writing, shall be deemed the agent of this company.

This policy shall not be valid until countersigned by the duly authorized agent of the company, at

In Witness Whereof, this company has executed and attested these presents.

The Home Insurance Company, New York

/s/ H. V. SMITH,
President.

By /s/ W. BEYER,
Secretary.

Countersigned at San Francisco, California, this
30th day of April, 1945.

.....
Agent.

Stipulations and Conditions Specially
Referred to

Property not covered. (a) This company shall not be liable for loss to accounts, bills, currency, evidences of debt or ownership or other documents, money, notes or securities; nor, (b) unless liability is specifically assumed hereon, for loss to bullion, casts, curiosities, drawings, dies, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, business or store or office furniture or

Exhibit A—(Continued)

fixtures, sculptures, frescoes, decorations, or property held on storage or for repair.

Hazards not covered. This company will not be liable for loss by (a) theft; or (b) by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire, or when the property is endangered by fire; or (c) (unless fire ensues, and in that event for the damage by fire only) by explosion of any kind or lightning; or (d) by invasion, insurrection, riot, or civil war, or commotion, or (except as hereinafter provided) by military or usurped power, or order of any civil authority, but the company will be liable (unless otherwise provided by endorsement hereon or added hereto) if the property is lost or damaged, by fire or otherwise, by civil authority or military or usurped power exercised to prevent the spread of fire not originating from a cause excepted hereunder and which fire otherwise probably would have caused the loss of or damage to the insured property.

Matters avoiding policy. This entire policy shall be void, (a) if the insured has concealed or misrepresented any material fact or circumstances concerning this insurance or the subject thereof; or, (b) in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

Unless otherwise provided by agreement endorsed hereon or added hereto, this entire policy shall be

Exhibit A—(Continued)

void, (a) if the insured now has or shall procure any other insurance, whether valid or not, on property covered in whole or in part by this policy, or (b) if the interest of the insured be other than unconditional and sole ownership, or (c) if the subject of insurance be a building on ground not owned by the insured in fee simple, or (d) if with the knowledge of the insured foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed, or (e) if this policy be assigned before a loss.

Matters suspending insurance. Unless otherwise provided by agreement endorsed hereon or added hereto this company shall not be liable for loss or damage occurring (a) while the hazard be materially increased by any means within the control of the insured; or (b) if the subject of insurance be a manufacturing establishment, while it is operated in whole or in part at night later than ten o'clock or while it ceases to be operated beyond the period of ten consecutive days; or (c) while mechanics or artisans are employed in building or altering or repairing the described premises for more than fifteen days at any one time; or (d) while illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or (e) while there be kept, used or allowed on the described premises (any usage or custom of trade or manufacture to the contrary notwithstanding) cal-

Exhibit A—(Continued)

cium carbide, phosphorus, dynamite, nitroglycerine, fireworks or other explosives; or exceeding one quart each of benzine, gasoline, naphtha or ether; or more than twenty-five pounds of gunpowder; or (f) while a building herein described whether intended for occupation by owner or tenant is vacant or unoccupied beyond the period of ten (10) consecutive days; (g) while the interest in, title to or possession of the subject of insurance is changed excepting:—(1) by the death of the insured; (2) a change of occupancy of building without material increase of hazard; and (3) transfer by one or more several copartners or coowners to the others.

Such suspension shall not extend the term of this policy nor create any right for refund of the whole or any portion of premium, nor affect the respective rights of cancellation.

Chattel mortgage. Unless otherwise provided by agreement in writing endorsed hereon or added hereto this company shall not be liable for loss or damage to any property insured hereunder while encumbered by a chattel mortgage, but the liability of the company upon other property hereby insured shall not be affected by such chattel mortgage.

Fallen building clause. Unless otherwise provided by agreement endorsed hereon or added hereto, if a building or any material part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

Exhibit A—(Continued)

Removal when endangered by fire. Should any of said property be necessarily removed because of danger from fire, and there is no other insurance thereon, that part of this policy in excess of the value of the insured property remaining in the original location, or, if there is other insurance thereon, that part of this policy in excess of its proportion of the value of the insured property remaining in the original location, shall, for the ensuing five days only, cover said removed property in its new location or locations.

Cancellation. This policy shall be cancelled at any time at the request of the insured, in which case the company shall, upon surrender of this policy, refund the excess of paid premium above the customary short rates for the expired time. This policy may be cancelled at any time, without tender of unearned portion of premium, by the company by giving five (5) days' written notice of cancellation to the insured and to any mortgagee or other party to whom, with the written consent of the company, this policy is made payable, in which case the company shall, upon surrender of the policy or relinquishment of liability thereunder, refund the excess of paid premium above the pro rata premium for the expired time.

Duty of insured in case of loss. When a loss occurs the insured must give to this company written notice thereof without unnecessary delay; and shall protect the property from further damage;

Exhibit A—(Continued)

forthwith separate the damaged and undamaged personal property and put it in the best possible order; and without unnecessary delay make a complete inventory stating as far as possible the quantity and cost of each article, and the amount claimed thereon.

Within sixty days after the commencement of the fire the insured shall render to the company at its main office in California named herein preliminary proof of loss consisting of a written statement signed and sworn to by him setting forth:— (a) his knowledge and belief as to the origin of the fire; (b) the interest of the insured and of all others in the property; (c) the cash value of the different articles or properties and the amount of loss thereon; (d) all incumbrances thereon; (e) all other insurance, whether valid or not, covering any of said articles or properties; (f) a copy of the description and schedules in all other policies unless similar to this policy, and in that event, a statement as to the amounts for which the different articles or properties are insured in each of the other policies; (g) any changes of title, use, occupation, location or possession of said property since the issuance of this policy; (h) by whom and for what purpose any building herein described, and the several parts thereof, were occupied at the time of the fire.

If the company claims that the preliminary proof of loss is defective and within five days after the

Exhibit A—(Continued)

receipt thereof (without admitting the amount of loss or any part thereof) notifies in writing the insured, or the party making such proof of loss, of the alleged defects (specifically stating them) and requests that they be remedied by verified amendments the insured or such party within ten days after receipt of such notification and request must comply therewith or, if unable so to do, present to the company an affidavit to that effect.

The insured shall also furnish, if required, as far as it is practicable to obtain the same, verified plans and specifications of any buildings, fixtures or machinery destroyed or damaged; and the insured shall exhibit to any person designated in writing by this company all that remains of any property herein described and shall submit to examination under oath, as often as required, by any such person, and subscribe to the testimony so given and shall produce to such person for examination all books of account, bills, invoices and other vouchers, and permit extracts and copies thereof to be made, and in case the originals are lost certified copies, if obtainable, shall be produced.

Ascertainment of amount of loss. This company shall be deemed to have assented to the amount of loss claimed by the insured in his preliminary proof of loss, unless within twenty days after the receipt thereof, or, if verified amendments have been requested, within twenty days after their receipt, or within twenty days after the receipt of

Exhibit A—(Continued)

an affidavit that the insured is unable to furnish such amendments, the company shall notify the insured in writing of its partial or total disagreement with the amount of loss claimed by him and shall also notify him in writing of the amount of loss, if any, the company admits on each of the different articles or properties set forth in the preliminary proof or amendments thereto.

If the insured and this company fail to agree, in whole or in part, as to the amount of loss within ten days after such notification, this company shall forthwith demand in writing an appraisement of the loss or part of loss as to which there is a disagreement and shall name a competent and disinterested appraiser, and the insured within five days after receipt of such demand and name, shall appoint a competent and disinterested appraiser and notify the company thereof in writing, and the two so chosen shall before commencing the appraisement, select a competent and disinterested umpire.

The appraisers together shall estimate and appraise the loss or part of loss as to which there is a disagreement, stating separately the sound value and damage, and if they fail to agree they shall submit their differences to the umpire, and the award in writing duly verified of any two shall determine the amount or amounts of such loss.

The parties to the appraisement shall pay the appraisers respectively appointed by them and shall

Exhibit A—(Continued)

bear equally the expense of the appraisement and the charges of the umpire.

If for any reason not attributable to the insured, or to the appraiser appointed by him, an appraisement is not had and completed within ninety days after said preliminary proof of loss is received by this company, the insured is not to be prejudiced by the failure to make an appraisement, and may prove the amount of his loss in an action brought without such appraisement.

Options of company in case of loss. This company may, at its option, take all or any part of the property for which insurance hereunder is claimed at its ascertained or appraised value, and may also, at its option, in satisfaction of its liability hereunder, repair, rebuild or replace any building or structure or machine or machinery used therein, with other of like kind and quality, within a reasonable time, upon giving notice within twenty days of its intention so to do after receipt by it of the preliminary proof of loss, or, if verified amendments have been requested, within twenty days after their receipt, or, within twenty days after the receipt of an affidavit that the insured is unable to furnish such amendments.

There can be no abandonment to this company of any property.

Apportionment of loss. This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for

Exhibit A—(Continued)

loss by, and expenses of, removal from the premises endangered by fire, than the amount hereby insured bears to the entire insurance covering such property whether valid or not, or by solvent or insolvent insurers.

Loss when payable. A loss hereunder shall be payable in thirty days after the amount thereof has been ascertained either by agreement or by appraisal; but if such ascertainment is not had or made within sixty days after the receipt by the company of the preliminary proof of loss, then the loss shall be payable in ninety days after such receipt.

Non-waiver by appraisal or examination. This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof, by assenting to the amount of the loss or damage or by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for.

Subrogation. If this company shall claim that the fire was caused by the act or neglect of any person or corporation, this company shall, on payment of the loss be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

Time for commencement of action. No suit or action on this policy for the recovery of any claim

Exhibit A—(Continued)

shall be sustained, until after full compliance by the insured with all of the foregoing requirements, nor unless begun within fifteen months next after the commencement of the fire.

Definitions. Wherever in this policy the word "insured" occurs, it shall be held to include the legal representatives of the insured in case of his death, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage," and wherever the words "the time of loss or damage" are used they shall be deemed the equivalent of "the time of the commencement of the fire."

Assignment of Interest by Insured

The interest of.....
as owner of the property covered by this Policy is
hereby assigned to.....
subject to the consent of The Home Insurance
Company, New York.

Dated.....19....

.....

(Signature of Insured)

Consent by Company to Assignment of Interest

The Home Insurance Company, New York,
hereby consents that the interest of.....
.....as owner of the property covered
by this Policy be assigned to.....

Dated.....19....

.....

Agent.

Exhibit A—(Continued)

Read This Policy

Ins. Co. is liable only for actual cash value.

Policy is void in case of any fraud, false swearing, misrepresentation or concealment about material facts.

Policy is void, unless otherwise agreed in writing, if

1st. It is assigned before loss;

2nd. Insured has or shall procure other insurance;

3rd. Any change occurs in location of property;

4th. Insured building is on ground not owned in fee simple by insured;

5th. Insured is not sole and unconditional owner.

Policy is suspended, unless otherwise agreed in writing, if

6th. Described building becomes vacant or unoccupied for 10 days;

7th. Mechanics are employed more than 15 days in repairing same;

8th. Property is or becomes encumbered by chattel mortgage;

9th. Illuminating gas or vapor is generated in or adjacent to described building;

10th. Explosives or prohibited quantities of gasoline, etc., are kept on premises.

Exhibit A—(Continued)

Insurance ceases if described building or any material part falls except as result of fire.

Policy does not cover certain enumerated personal property.

Note particularly duty of insured in case of loss;

Also provisions avoiding or suspending policy, including changes of ownership or possession.

It is important that the written portions of all policies covering the same property read exactly alike. If they do not they should be made uniform at once.

EXHIBIT B

“Business Interruption—Fire”

This Policy Insures

Pickering Lumber Corporation

As now or may hereafter be constituted.

For account of whom it may concern.

1. “Loss Payable Conditions”—Loss, if any, to be adjusted with and payable to Pickering Lumber Corporation.

2. “Coverage”—

Amount: \$

2(A). The conditions of this contract are that if the buildings and/or structures and/or machinery and/or equipment and/or supplies and/or all that property upon which the printed conditions of this policy require that liability be specifically assumed

Exhibit B—(Continued)

and/or raw stock (all as now or hereafter existing); in, on and/or under "Plantsite," "Athletic Field" and "Townsite" premises situate at and near Standard, Tuolumne County, California, and occupied or used for woodworking or mercantile, or for any other purposes, including (but not limited to) townsite purposes or purposes incidental or related to such woodworking or mercantile operations, be destroyed or damaged by fire occurring during the term of this policy so as to necessitate a total or partial suspension of business, this Company shall be liable under this policy for the actual loss sustained by reason of such suspension, consisting of:

Item I. The net profits on the business which is thereby prevented;

Item II. Fixed charges and expenses, only to the extent to which they would have been earned had no fire occurred, as follows: Salaries of indispensable employees, superintendents, executives, salesmen and of employees under contract, taxes, interest, rents, royalties, insurance premiums, depreciation, advertising, special contracts, dues, subscriptions, directors' fees, accounting expenses, legal expenses and fees, light, heat and power, and such other fixed charges and expenses which must necessarily continue during a total or partial suspension of business.

2(B). It Is Understood and Agreed That This Insurance Is Extended (Subject to All Its Other

Exhibit B—(Continued)

Terms, Conditions and Stipulations) to Cover Actual Loss Sustained, as Otherwise Defined, Resulting from Damage to or Destruction by the Perils Insured Against of Any Bridges and/or Trestles Used in Connection With the Insured's Logging Operations in Tuolumne County and Adjoining Counties.

The Provisions Printed on the Back of This Form or on Other Pages Attached Hereto Are Hereby Referred to and Made a Part Hereof.

This form is attached to and made a part of Policy No. 16517 of the Home Insurance Company.

Date: April 30, 1945.

/s/

Agent.

Cosgrove & Company, Inc.

Insurance Brokers—Average Adjusters

2(C). It is understood and agreed that any income derived from or expenses incurred in the store and townsite operations of the insured at Standard, Tuolumne County are not covered hereunder and such income and expenses shall not be considered in the application of the average clause made a part hereof.

3. It is a condition of this contract that the length of time of suspension for which loss may be claimed:

Exhibit B—(Continued)

(A) Shall not exceed seventy-five per cent (75%) of 365 calendar days;

(B) Shall not exceed such length of time as would be required with due diligence and dispatch to rebuild, repair or replace such property herein described as may have been destroyed or damaged;

(C) Shall commence with the date of the fire and not be limited by the date of expiration of this policy.

4. "Contribution Clause"—It is expressly stipulated and made a condition of this contract that, in the event of loss, this company shall be liable for no greater proportion thereof than the amount hereby insured bears to seventy-five per cent (75%) of the total of the net profits (Item I) and charges and expenses (as specified in Item II) which would normally have been earned during the period of twelve (12) months immediately following the fire.

5. This company shall not be liable under this policy as to net profits for more than the net profits prevented by the total or partial suspension of business nor for charges and expenses in excess of those which must necessarily continue during a total or partial suspension of business, and then only to the extent to which such charges and expenses would have been earned had no fire occurred; nevertheless this company shall be liable for such expenses as may be incurred for the purpose of reducing any

Exhibit B—(Continued)

loss under this policy, not exceeding, however, the amount in which the loss is so reduced.

6. In determining the amount of net profits and charges and expenses that would have been earned had no fire occurred, whether for the purpose of ascertaining the amount of loss sustained or in the application of the contribution clause, due consideration shall be given to the experience of the business before the fire and the probable experience thereafter.

7. The term "raw stock" wherever used in this contract shall be construed to mean materials and supplies usual to the insured's business in the state in which the insured receives them or which have undergone any aging, seasoning, mechanical or other process of manufacture but which have not become "finished stock."

The term "finished stock" wherever used in this contract shall be construed to mean any stock which in the ordinary course of the insured's business is ready for packing, shipment or sale.

8. The word "day," however modified, wherever used in this contract, shall be held to cover a period of twenty-four hours.

9. It is a condition of this insurance that the insured shall not be entitled to compensation on account of loss which may be occasioned by any ordinance or law regulating or prohibiting construction or repair of buildings, or by the suspen-

Exhibit B—(Continued)

sion, lapse or cancellation of any license or lease, or for any other remote loss.

10. It is a condition of this insurance that as soon as practicable after any loss, the insured shall resume complete or partial operation of the property herein described, and shall make use of other property, if obtainable, if by so doing the amount of loss hereunder will be reduced, and in the event of the loss being so reduced such reduction shall be taken into account in arriving at the amount of the loss hereunder.

11. It is a condition of this insurance that surplus machinery or duplicate parts thereof, equipment or supplies, and (if this policy covers liability for suspension of business due to damage to or destruction of raw stock) surplus or reserve raw stock, which may be owned, controlled or used by the insured, shall in the event of loss, be used in placing the property in condition for continuing or resuming business.

12. It is a condition of this insurance

(A) That this company shall in no event be liable for loss resulting from damage to or destruction of finished stock or for the time required to reproduce any finished stock which may be damaged or destroyed;

(B) That if liability for suspension of business due to damage to or destruction of raw stock is

Exhibit B—(Continued)

specifically assumed hereunder, such liability shall be limited to that period of time for which the damaged or destroyed raw stock would have made operations possible, but in no event to exceed the time limit specified in paragraph No. 3 of this form.

13. It is a condition of this insurance, if this policy covers liability for suspension of business due to damage to or destruction of building(s), machinery and equipment only, that this company shall not be liable for any loss due to damage to or destruction of any stock, whether raw or finished.

14. It is a condition of this insurance that in case the insured and this company are unable to agree as to the time necessary to rebuild, repair or replace the described property, and/or the value of the subject of this insurance, and/or the amount of loss thereon, the same shall be determined by appraisal in the manner provided by this policy, the provisions of which policy shall govern in all matters pertaining to this insurance except as herein otherwise provided.

15. The liability hereunder shall not exceed the amount of insurance by this policy, nor a greater proportion of any loss than the insurance hereunder shall bear to all insurance, whether valid or not, and whether collectible or not, covering in any manner the loss insured against by this policy.

16. "Interruption by Civil Authority"—Not-

Exhibit B—(Continued)

withstanding anything to the contrary herein, this Company shall be liable for actual loss sustained, as covered hereunder, during the period of time, not exceeding two weeks, while access to the premises described is prohibited by order of civil authority, but only when such order is given as a direct result of fire in the vicinity of said premises.

17. “Lightning and Electrical Apparatus Clause”—

(a) Except as hereinafter provided, this policy shall cover Business Interruption loss resulting directly from damage to the property described as covered, caused by lightning, meaning thereby the commonly accepted use of the term “lightning,” and in no case to include damage by cyclone, tornado or windstorm.

(b) This company shall not be liable for any business interruption loss resulting from any electrical injury, disturbance or damage to wiring or electrical appliances or devices of any kind whether from artificial or natural causes unless fire ensues and then only for such business interruption loss caused by such ensuing fire.

(c) Liability under the above lightning and electrical apparatus clause, shall be subject to all the conditions and limitations of this form and the policy to which it is attached, and if there is any other business interruption insurance on said property, this company shall be liable only pro rata with such other insurance, for business interrup-

Exhibit B—(Continued)

tion loss caused by lightning, whether such other insurance be against loss by lightning or not.

18. "Consequential Damage Assumption Clause." It is understood and agreed that this Company shall be liable for any Business Interruption loss due to damage to stock of merchandise and/or supplies caused by change of temperature resulting from total or partial destruction by fire, or refrigerating or cooling apparatus, connections or supply pipes.

18(A). The total liability for Business Interruption loss caused by fire and/or consequential damage, either separately or together shall in no case exceed the total amount of this policy in effect at the time of loss. If there is other Business Interruption insurance upon the property damaged, this Company shall be liable only for such proportion of any consequential loss as the amount hereby insured bears to the whole amount insured thereon whether such other said insurance contains a similar clause or not.

19. "Loss Reinstatement Clause"—It is a condition of this policy that in case of loss occurring hereunder the amount of such loss shall be automatically reinstated after its occurrence and this insurance shall then cover for the full amount provided for hereunder. In consideration of such reinstatement it is a condition of this policy that the insured shall pay this Company a pro rata addi-

Exhibit B—(Continued)

tional premium for the unexpired term of this policy on the amount of the loss paid provided such loss payment exceeds One Hundred Dollars (\$100.00). In the event the insured does not require reinstatement of the amount of the loss, notice shall be given this Company without unnecessary delay and the amount of insurance under this policy shall then be reduced by the amount of the loss.

20. "Automatic Sprinkler Warranty"—Applying Only to the Box Factory and Planing Mill Group—This policy being written at a reduced rate based on the protection of a portion of the box factory and planing mill group by an automatic sprinkler system, it is a condition of this policy that, so far as the sprinkler system and the water supply therefor are under the control of the insured, due diligence shall be used by the insured to maintain them in complete working order, and that no change shall be made in the said system or in the water supply therefor without the consent in writing of this company or the Board of Fire Underwriters of the Pacific.

21. "Watchman With Approved Recording System or Watchlock Warranty"—Applying only to the plantsite premises—warranted by the insured that due diligence will at all times be used by the insured to maintain one or more watchmen (with approved recording system or watchclock) who shall keep a continuous watch in and about the within described premises during the entire night, whether

Exhibit B—(Continued)

the premises herein described be open for business or shut down or not in operation, and also during the entire day or portion thereof (including Sundays and holidays) when said premises are not open for business or are shut down or are not in operation. A breach of this warranty suspends this insurance during such breach.

22. "Clear Space Warranty"—Applying Only to Property Insured Hereunder While Contained in the Lumber Storage Yard Which Is West of the Dry Kiln and Dry Kiln Shed Group and West of the Planing Mill and Cut-Up Factory Group at Location No. 1—Warranted by the insured that a continuous clear space of two hundred (200) feet shall be maintained between the stock in the lumber storage yard and the sawmill and dry kiln group and two hundred and forty (240) feet between the stock in the lumber storage yard and the planing mill and cut-up factory group, except that a clear space of two hundred (200) feet only shall be required between the planing mill and cut-up factory group and barn building No. 106 situate southeast of the lath storage yard, and that such clear space shall not be used for handling or piling of lumber or other merchandise therein for any purpose, it being the intention of the parties that such clear space shall establish the yard limits.

22(A). It is further understood and agreed by the Insured that any violation of this "Clear Space

Exhibit B—(Continued)

Warranty” shall wholly suspend the insurance under this policy insofar as it applies to property insured hereunder when contained in the Lumber Yard during the period such violation shall continue.

22(B). Permission, however, is granted the Insured under this policy to load or unload within, and to transport lumber and/or other merchandise across such clear space, and to maintain thereon tramways upon which lumber or other merchandise shall not be piled, except that, when lumber is transported by overhead electric system, the piling of lumber for such transportation within the clear space for a period not exceeding seventy-two (72) hours shall not be considered a violation of this “Clear Space Warranty”; nor shall the location and existence of; conveyors, monorail structures; monorail station; monorail repair house; girls’ lunch room; old Box Factory Boiler House Building Nos. 44 and 45; monorail bunks; supports for piping; fire fighting facilities; tracks; vehicles; rolling stock; lumber on or in cars; fences; toilets; wooden bridges; or hose and hydrant houses; be considered as a violation under this agreement.

23. “Fallen Building Clause”—Applying to All Property Except Blower Station Building and Box Factory and Planing Mill Group, Including Cut Stock and Lumber Shed Additions and Other Additions and Extensions in Contact Therewith and All

Exhibit B—(Continued)

Contents Thereof—If a building or any material part thereof, fall, except as a result of fire, all insurance by this policy shall immediately cease.

24. “Fallen Building Clause Waiver”—Applying To Blower Station Building and Box Factory and Planing Mill Group, Including Cut Stock and Lumber Shed Additions and Other Additions and Extensions in Contact Therewith and All Contents Thereof—The provisions (if any) in this policy to the effect that if the building or any part thereof fall, except as the result of fire, all insurance by this policy shall immediately cease, are hereby waived. Under this insurance against use and occupancy loss by fire and this Fallen Building Clause Waiver, this company is not liable for Business Interruption loss caused by earthquake, or by the fall of any portion of said building from cause other than fire, unless fire ensues, and then for the Business Interruption loss of fire only.

24(A). “Contribution Clause, Including Provision That Other Insurance Invalidated Under ‘Fallen Building Clause’ Shall Be Deemed To Be Contributing Insurance”—It is understood and agreed that this company shall not be liable under this policy for a greater proportion of any business interruption loss on the within described subject of insurance than the amount hereby insured bears to the entire fire business interruption insurance on such subject of insurance, whether valid or not, or

Exhibit B—(Continued)

by solvent or insolvent insurers; provided that such entire fire business interruption insurance shall be deemed to include also all fire business interruption insurance on the subject of insurance, which has been invalidated by the fall of the within described building, or part thereof, and which but for such fall would have been in force at the time of loss hereunder.

25. "Notification Clause"—It is understood and agreed that all notices and/or communications concerning this policy shall be addressed to the offices of the insured at Standard, Tuolumne County, California.

26. "Ownership Clause"—It is understood and agreed that one or more deeds of trust, bonded indebtedness, chattel or other mortgages may exist or be negotiated on the property insured; that foreclosure proceedings may be instituted or notice given of sale of any property covered by this policy; that the interest of the insured may be other than unconditional and sole ownership and that the buildings may be on ground not owned by the insured in fee simple; that changes may take place in the interest, title or possession of the subject of insurance whether by legal process or judgment or by voluntary act of the insured, or otherwise; all without prejudice to this insurance.

27. "Subrogation Clause"—Without prejudice to this insurance and at any time prior to a loss the

Exhibit B—(Continued)

insured may release any corporation, firm, individual or other entity from liability for loss caused by act or neglect of themselves or their employees, agents or representatives. All right of subrogation is hereby waived under this policy if it is claimed that loss was occasioned or caused by the act or neglect of any corporation, firm, individual or other entity to which or to whom coverage is afforded under this policy or of any corporation, firm, individual or other entity parent or subsidiary to, owned or controlled by or affiliated with the insured.

28. "Time Clause"—Wherever time is referred to in this policy it shall be construed to mean the "Standard Time" of the place where the property being the subject of this insurance is situated.

29. "Acts or Omissions Clause"—It is understood and agreed that this insurance shall not be prejudiced by reason of any acts or omissions on the part of sub or other tenants, when such acts or omissions are not within the control of the insured named herein.

30. "Error in Description Clause"—It is understood and agreed that any error in description or location of the within described premises shall not prejudice this insurance.

Exhibit B—(Continued)

31. "Permits Clause"—Permission is hereby granted, without limit of time but without extending the term of this policy: for existing and increased hazards; to work at all hours, day and night; to cease operations and/or shut down and/or remain vacant or unoccupied (subject to the limitations indicated below); to make such changes in the use and occupancy of the premises as may be desired; to make additions, alterations, improvements and repairs (this insurance to cover therein and/or thereon); to delete and/or reconstruct; to generate illuminating gas or vapor; and for such use of the premises as is usual and/or incidental in the business, as conducted therein, and to keep and use all articles and materials usual and/or incidental to said business, in such quantities as the exigencies of the business require; anything in the printed conditions of this policy to the contrary notwithstanding.

31(A). It is agreed, however, that if the "Plant-site" premises are shut down and/or not in operation and/or vacant or unoccupied for a period in excess of sixty (60) consecutive days at any one time during the term of this policy, written permit must be obtained from this company and endorsed hereon.

31(B). Other Insurance Permitted.

32. "War Emergency Clause"—In consideration of the rate and premium at which this policy is written, it is a condition of this insurance that not-

Exhibit B—(Continued)

withstanding any provision of the policy excluding liability for loss caused by order of any civil authority or any provision in the policy or form attached thereto excluding loss which may be occasioned by any ordinance or law regulating construction or repair, this company shall be liable, subject to all other conditions and limitations of the policy, for loss resulting from additional time (not exceeding the maximum limit of time, if any, specifically stated in this policy) required to rebuild, replace, or repair property herein described as a consequence of any law, government order or directive which regulates, prohibits or restricts construction, the acquisition of machinery, equipment, or other means required for the replacement or repair of property damaged or destroyed; but in no event shall this company be liable for any delay which may be caused, directly or indirectly, by any local law or ordinance regulating construction or repair.

32(A). This company shall not be liable for a greater proportion of any loss than the amount of insurance under this policy bears to the whole amount of insurance, whether valid or not and whether collectible or not, applying to any part of the liability assumed under this policy whether or not other insurance covers or excludes in whole or in part liability assumed by this clause.

33. "Warranty Compliance Clause"—This policy shall not be affected by failure of the insured to comply with any of the warranties or conditions en-

Exhibit B—(Continued)

dorsed on this policy in any portion of the premises over which the insured has no control.

34. "Breach of Warranty and/or Condition Clause"—If a breach of any warranty and/or condition contained in any rider attached to this policy shall occur, which breach by the terms of such warranty and/or condition, shall operate to suspend or avoid this insurance, it is agreed that such suspension or avoidance due to such breach, shall be effective only during the continuance of such breach and then only to the building and/or fire division and/or contents therein and/or other separate location to which such warranty and/or condition has reference and in respect of which such breach occurs.

35. "Unpaid Premium Clause"—Regardless of any loss payable or mortgage clause or other provision of this policy, and notwithstanding insured shall have become indebted to the company subsequent to the date hereof, on this or some other policy, the company shall deduct from the proceeds of any and all claims for loss, dividends or return premiums due the insured, or others hereunder, the amount in which insured shall be indebted to Cosgrove & Company, Inc. for insurance premiums advanced by it upon this policy and shall pay to or place to the credit of Cosgrove & Company, Inc. such deducted amount.

EXHIBIT C

Policy No.	Name of Plaintiff	(A) Amount of Policy	(B) Appraisal Award	(C) Advance Payment	(D) Amount Tendered
027885	The American Insurance Company.....	\$ 5,000.00	\$ 3,774.04	\$ 1,920.12	\$ 1,853.92
S-705012	Atlas Assurance Company Limited.....	20,000.00	15,096.14	7,680.49	7,415.65
134336	Caledonian Insurance Company.....	38,750.00	29,248.77	14,880.95	14,367.82
834784	The Camden Fire Insurance Association.....	17,500.00	13,209.12	6,720.43	6,488.69
400443	Columbia Insurance Company of New York.....	8,000.00	6,038.46	3,072.20	2,966.26
923047	Commercial Union Assurance Company, Limited.....	25,000.00	18,870.18	9,600.61	9,269.57
645621	The Continental Insurance Company.....	25,000.00	18,870.18	9,600.61	9,269.57
PF-63798	Fire Association of Philadelphia.....	10,000.00	7,548.07	3,840.25	3,707.82
A-34562	Fireman's Fund Insurance Company.....	17,000.00	12,831.72	6,528.42	6,303.30
29455	Firemen's Insurance Company of Newark, New Jersey.....	15,000.00	11,322.11	5,760.37	5,561.74
PCF-448625	Glens Falls Insurance Company.....	40,000.00	30,192.28	15,360.98	14,831.30
38917	Globe and Rutgers Fire Insurance Company.....	5,000.00	3,774.04	1,920.12	1,853.92
56134	Great American Insurance Company.....	20,250.00	15,284.84	7,776.50	7,508.34
148251	The Hanover Fire Insurance Company.....	10,000.00	7,548.07	3,840.25	3,707.82
198018	Hartford Fire Insurance Company.....	10,000.00	7,548.07	3,840.25	3,707.82
16517	The Home Insurance Company.....	15,000.00	11,322.11	5,760.37	5,561.74
338100	Insurance Company of North America.....	7,500.00	5,661.05	2,880.18	2,780.87
OU-457353	(Same).....	15,000.00	11,322.11	5,760.37	5,561.74
238990	National Fire Insurance Company of Hartford.....	32,625.00	24,625.58	12,528.80	12,096.78
347379	National Liberty Insurance Company of America.....	16,800.00	12,680.76	6,451.61	6,229.15
118314	National Union Fire Insurance Company of Pittsburg, Pa.....	15,000.00	11,322.11	5,760.37	5,561.74
41378	New Hampshire Fire Insurance Company.....	30,000.00	22,644.21	11,520.74	11,123.47
137856	New York Underwriters Insurance Company.....	20,000.00	15,096.14	7,680.49	7,415.65
133093	New Zealand Insurance Company, Limited.....	25,000.00	18,870.18	9,600.61	9,269.57
U-111058	The Northern Assurance Company Limited.....	32,125.00	24,248.18	12,336.79	11,911.39
93876	Norwich Union Fire Insurance Society Limited.....	12,500.00	9,435.09	4,800.31	4,634.78
655548	Pearl Assurance Company, Limited.....	10,000.00	7,548.07	3,840.25	3,707.82
249446	The Pennsylvania Fire Insurance Company.....	15,000.00	11,322.11	5,760.37	5,561.74
Q-86515	Queen Insurance Company of America.....	32,750.00	24,719.93	12,576.81	12,143.12
149178	St. Paul Fire & Marine Insurance Company.....	5,000.00	3,774.03	1,920.12	1,853.91
F-62436	Scottish Union and National Insurance Company.....	5,000.00	3,774.03	1,920.12	1,853.91
112553	Security Insurance Company, of New Haven.....	25,000.00	18,870.18	9,600.61	9,269.57
283551	Springfield Fire and Marine Insurance Company.....	10,000.00	7,548.07	3,840.25	3,707.82
205026	The Travelers Fire Insurance Company.....	17,500.00	13,209.12	6,720.43	6,488.69
CL-52793	United States Fire Insurance Company.....	20,200.00	15,247.10	7,757.30	7,489.80
544918	Westchester Fire Insurance Company.....	15,000.00	11,322.11	5,760.37	5,561.74
CL-3679	The Western Assurance Company.....	7,500.00	5,661.05	2,880.18	2,780.87
Totals.....		\$651,000.00	\$491,379.41	\$250,000.00	\$241,379.41

[Endorsed]: Filed June 13, 1947.

[Title of District Court and Cause.]

SECOND AMENDED ANSWER AND
COUNTER CLAIM

Answer

The defendant admits, denies and otherwise pleads to the complaint in the above-entitled cause as follows:

I.

The allegations of paragraph I of the complaint are admitted.

II.

The allegations of paragraph II of the complaint are admitted.

III.

The allegations of paragraph III of the complaint are admitted.

IV.

The allegations of paragraph IV of the complaint are admitted.

V.

The allegations of paragraph V of the complaint are admitted.

VI.

The allegations of paragraph VI of the complaint are admitted.

VII.

The allegations of paragraph VII of the complaint are admitted.

VIII.

The allegations of paragraph VIII of the complaint are admitted.

IX.

The allegations of paragraph IX of the complaint are admitted.

X.

Defendant admits that plaintiffs and defendant failed to agree, within 10 days after the notice of disagreement referred to in paragraph IX of the complaint, as to the amount of loss, but states there was no attempt by plaintiffs or defendant to agree as to the "value of the subject of insurance." Defendant admits that on or about the 21st day of February, 1947, and within the time provided by said policies of insurance, plaintiffs demanded in writing an appraisal and appointed an appraiser and that defendant thereupon appointed an appraiser and that the two appraisers so chosen, before commencing the appraisal, selected an umpire.

XI.

The allegations of paragraph XI of the complaint are admitted except defendant denies the allegation that "the value and loss were estimated, ascertained, and approved, and the sound value

and damage were separately stated, all in accordance with the provisions of said policies of insurance.”

XII.

The allegations of paragraph XII of the complaint are admitted except that defendant denies that each and every plaintiff tendered to defendant the full amount payable by it respectively and alleges in that regard that some of the plaintiff insurance companies tendered their proportionate share of the amount awarded by the appraisers and that thereafter defendant returned the amounts so tendered to said plaintiff insurance companies and at that time defendant advised the representative for the plaintiff insurance companies that defendant would not accept payments from said plaintiff insurance companies under said award and that defendant intended to dispute the validity of said award. Defendant denies that the aggregate amount payable to defendant by plaintiffs pursuant to the provisions of said policies of insurance is the sum of \$491,379.41 and denies that the amount payable by each plaintiff under and by virtue of said ascertainment and said provision is that proportion of \$491,379.41 which the face amount of each of said policies bears to the aggregate face amount of all of said policies.

XIII.

The allegations of paragraph XIII of the complaint are admitted.

XIV.

The allegations of paragraph XIV of the complaint are denied.

XV.

Defendant denies the allegations in paragraph XV of the complaint to the effect that said appraisal award was or is liberal in the amounts thereby determined, and that the loss and damage suffered by defendant as a result of said fire, within the contemplation of the coverage of said policies of insurance, was or is in fact substantially less than the amounts fixed in or determined by said appraisal award.

XVI.

Defendant denies that it ever intended or now intends, or that it has ever threatened to institute separate actions upon each of said policies of insurance, but alleges that, at the time the complaint was filed, defendant intended to bring a single action upon all of said policies in the State of California.

XVII.

Defendant adopts as a part of this Answer the paragraphs numbered III to V, both inclusive, and X to XVII, both inclusive, of Count 1 of defendant's Counterclaim herein.

Defendant, within a reasonable time, in a convenient forum, and in a form of action involving no unnecessary expense, delay, trouble, or any multiplicity of suits, has instituted a single action at

law upon all of said policies and has demanded a jury trial thereof. It would therefore be an abuse of discretion and a denial of defendant's right to a trial by jury guaranteed to defendant by the Seventh Amendment of the Constitution of the United States if this court should, as prayed in the alternative in the complaint determine and fix the amount of loss and damage suffered by defendant, except by a jury trial pursuant to Count II of defendant's Counterclaim.

Wherefore, defendant prays that the relief prayed for in plaintiff's complaint be denied.

COUNTERCLAIM

Count I.

I.

Defendant adopts by reference paragraphs I, II, and III of the complaint filed herein.

II.

On or about April 30, 1945, each of the plaintiffs did in the State of California, in consideration of a premium paid by defendant to each of plaintiffs, issue and deliver to defendant its policy or policies of insurance, known as use and occupancy or business interruption insurance, each insuring defendant against actual loss sustained by reason of total or partial suspension of business on account of destruction or damage by fire of any of defendant's property described in the policy. Each

policy was for a term of one year from and after April 30, 1945, and provided that the length of time of suspension for loss that may be claimed (a) shall not exceed seventy-five per cent (75%) of 365 calendar days; (b) shall not exceed such length of time as would be required, with due diligence and dispatch to rebuild, repair or replace such property therein described as may have been destroyed or damaged; and (c) shall commence with the date of the fire and not be limited by the date of expiration of the policy. A copy of the policy of insurance so issued by plaintiff, The Home Insurance Company, is attached to the complaint herein, marked Exhibit A and Exhibit B, and is adopted by reference and made a part hereof. Each of the policies issued by the plaintiffs is identical in form and substance to said policy issued by plaintiff, The Home Insurance Company, except that there is a difference as to the number of the policy, the name of the insurance company issuing the policy, the names of the persons who signed the policy on behalf of the various insurance companies, and the amount of the policy. The identifying number of and the amount of insurance provided for (as of July 7, 1945) in each of the policies so issued by plaintiffs is as follows:

Name of Plaintiff and Number of Policy	Amount
The American Insurance Company (027885)	\$ 5,000
Atlas Assurance Company Limited (S-705012)	20,000
Caledonian Insurance Company (134336)	38,750
The Camden Fire Insurance Association (834784)	17,500
Columbia Insurance Company of New York (400443)	8,000
Commercial Union Assurance Company, Limited (923047)	25,000
The Continental Insurance Company (645621)	25,000
Fire Association of Philadelphia (PF-63798)	10,000
Fireman's Fund Insurance Company (A-34562)	17,000
Firemen's Insurance Company of Newark, New Jersey (29455)	15,000
Glens Falls Insurance Company (PCF-448625)	40,000
Globe and Rutgers Fire Insurance Company (38917)	5,000
Great American Insurance Company (56134)	20,250
The Hanover Fire Insurance Company (148251)	10,000
Hartford Fire Insurance Company (198018)	10,000
The Home Insurance Company (16517)	15,000
Insurance Company of North America (338100)	7,500
(Same) (OU-457353)	15,000
National Fire Insurance Company of Hartford (238990) ..	32,625
National Liberty Insurance Company of America (347379)	16,800
National Union Fire Insurance Company of Pittsburg, Pa. (118314)	15,000
New Hampshire Fire Insurance Company (41378)	30,000
New York Underwriters Insurance Company (137856)	20,000
New Zealand Insurance Company, Limited (133093)	25,000
The Northern Assurance Company, Limited (U-111058) ..	32,125
Norwich Union Fire Insurance Society Limited (93876) ..	12,500
Pearl Assurance Company, Limited (655548)	10,000
The Pennsylvania Fire Insurance Company (249446)	15,000
Queen Insurance Company of America (Q-86515)	32,750
St. Paul Fire & Marine Insurance Company (149178)	5,000
Scottish Union and National Insurance Company (F-62436)	5,000
Security Insurance Company, of New Haven (112553)	25,000
Springfield Fire and Marine Insurance Company (283551)	10,000
The Travelers Fire Insurance Company (205026)	17,500
United States Fire Insurance Company (CL-52793)	20,200
Westchester Fire Insurance Company (544918)	15,000
The Western Assurance Company (CL-3679)	7,500

The total amount of insurance provided for (as of July 7, 1945) in and by all of said policies is the aggregate sum of \$651,000.00. At the time of the fire hereinafter referred to, defendant carried no use and occupancy or business interruption insurance other than or in addition to that contracted for by plaintiffs as aforesaid:

III.

At the time when said policies were issued, and at all times thereafter up until the event of the fire hereinafter mentioned, defendant owned and operated a plant for the manufacture of lumber and lumber products and owned a large amount of standing timber which it regularly cut and transported to its lumber plant. Said plant consisted of a saw mill, a planing mill, a box factory, dry kilns, engine and fuel houses, a log pond, and various other structures and equipment used in the manufacture of lumber and lumber products. Said saw mill was equipped with two saws and was so constructed that one side of said mill could be operated for the purpose of cutting logs into lumber without the operation of the other side of the mill. Said plant is the property which is described in each of the insurance policies issued by plaintiffs.

IV.

At approximately five o'clock in the afternoon on July 7, 1945, said saw mill was destroyed by fire which caused a complete suspension of business by defendant for a few days and caused a complete

suspension of the operation of the saw mill for more than one year thereafter. Each and every policy issued by the plaintiffs provided that as soon as practicable after any loss the insured should resume complete or partial operation of the property described in the policy and should make use of other property, if obtainable, if by so doing the amount of loss under the policy would be reduced and in the event of the loss being so reduced such reduction should be taken into account in arriving at the amount of the loss. At the time of the fire, defendant had on hand a large amount of lumber which it had procured by running its logs through its saw mill and which lumber was suitable for being used in said box factory for the manufacture of box shooks. Defendant made inquiries concerning the procurement of machinery, equipment and materials for rebuilding the saw mill and from the information acquired, it appeared that one side of the saw mill could be rebuilt and put into operation within less than nine months of the date of the fire, thus permitting partial operation of the saw mill within the term insured by the policy. The timber owned by defendant is in mountainous country and in the winter months snow prevents the cutting of logs or the hauling of logs from the woods. Therefore, in order to carry on the partial operation of the saw mill within the nine-month period covered by the insurance policies, it was necessary to cut additional logs before such time as such operations

would be halted by snow. It was also necessary to haul logs from the woods which had resulted from cutting timber before the fire occurred, and to deck them at defendant's plant site, in order to arrest deterioration, decay, check and depreciation of said logs already cut. Therefore, pursuant to the provision of the policies for resumption of partial operation, defendant continued to cut logs in the woods and to transport such logs, (together with the logs which had already been cut before the fire occurred) from the woods to its plant site. Defendant's log pond was not large enough to receive so great a supply of logs, and therefore it was necessary to deck a great many of said logs at the plant site, which occasioned continuing expense, more particularly mentioned hereafter. Defendant also resumed partial operation by operating its box factory, and for that purpose used all of its supply of lumber suitable for the manufacture of box shooks.

V.

After defendant had resumed partial operation, consisting of logging, transporting the logs to the plant site, decking the same and operating the box factory, defendant became apprised of the fact that neither side of the saw mill could be completed in time to resume operation of the saw mill within the nine-month period covered by the insurance policies, because it would not be possible to obtain the machinery and equipment necessary therefore, due to strikes. Whereupon defendant ceased its

logging operations, but continued to operate its box factory until all of its lumber available for the manufacture of box shook was consumed.

VI.

On or about March 22, 1946, each of the plaintiffs contributed to and advanced payment to defendant on account of the fire and loss, pending ascertainment of the amount of such loss. Said advance payment was in the aggregate amount of \$250,000.00. The amount paid by each plaintiff to defendant by way of advance is as shown in column C of Exhibit "C" attached to the complaint. Said Exhibit "C" is hereby adopted by reference.

VII.

Defendant adopts paragraphs VII, VIII, and IX of the complaint by reference.

VIII.

Plaintiffs and defendant failed to agree within ten days after the notice of disagreement served by plaintiffs upon defendant as to the amount of loss under said policies of insurance. On or about February 21, 1947, and within the time provided by said policies of insurance, all of the plaintiffs, acting in concert, made a joint and single demand in writing for an appraisalment and jointly named a single appraiser. Thereupon, within the time provided by each of said policies of insurance, defendant appointed a single appraiser. The two appraisers so chosen, before commencing the appraisalment, selected a single umpire.

IX.

Thereafter the two appraisers and the umpire entered upon a single appraisalment (otherwise acting pursuant to the provisions of each of said policies of insurance) and on or about April 18, 1947, the appraisers requested plaintiffs and defendant to extend the time for completion of the appraisalment until May 3, 1947, to which all of the plaintiffs and defendant consented in writing. Within said time, as so extended, the appraisers made a single written award which was signed and verified by said two appraisers and by said umpire. By said written appraisalment, the net profits prevented and the fixed charges and continuing expenses during the period from July 8, 1945, to April 7, 1946, as reduced by profits realized, and fixed charges and continuing expenses recovered by partial operation following the fire, were fixed at the amount of \$581,000.00, the net profits prevented and charges and expenses which would normally have been earned during the period of twelve months immediately following the fire were fixed at the amount of \$1,030,000.00, and expenses incurred by defendant other than those constituting costs of partial operation for the purpose of reducing the loss were fixed in the sum of \$1,760.00.

X.

The only agreement that defendant ever made with any of the plaintiffs concerning an ascertainment of the amount of the loss (other than by agreement of the parties or a judgment) was made

by accepting the policies of insurance issued by the plaintiffs to the defendant, all of which provided (in the event of disagreement) for a mere appraisal of the loss, and not for an arbitration. Both parties construed the proceedings of the appraisers and the umpire to be an appraisal and not an arbitration. Defendant requested that the appraisers afford a hearing and the appraisers pursuant thereto gave notice of the time and place of the hearing and permitted the defendant and a representative of the plaintiffs to appear and permitted both to furnish figures and explanations of their claims and theories, but defendant did not procure the attendance at such hearing of any persons other than those who voluntarily appeared and did not request that any subpoena be issued for a number of persons whose attendance was desired by defendant but who would not voluntarily appear, because the appraisers had no right to issue a subpoena for a witness. At the hearing plaintiffs' representative announced that the appraisers were not confined to the information received at the hearing, but could inform themselves in any legitimate manner and from any legitimate source they saw fit, to which statement defendant offered no objection or exception. Those who appeared, both for defendant and for the plaintiffs, were not sworn. The appraisers and umpire did not, in arriving at their findings of fact, confine themselves to the information furnished at such hearing. Both before and after said hearing the

appraisers separately consulted with various parties ex parte, both as to facts and theories, and acted in part upon information received by such ex parte investigations, without affording the parties an opportunity to cross-examine or further inquire of the persons so interrogated, and without opportunity to the parties to furnish additional information on account of the information purported to have been given by the persons so interrogated and consulted ex parte.

XI.

Defendant notified all of the plaintiffs that it intended to dispute the validity of said award and refused to accept any payment thereunder, from such of the plaintiffs as tendered payment thereunder, and defendant has never received any sum whatsoever pursuant to the provisions of said award, but has only received aggregate payments on account in the sum of \$250,000.00, which were made by the plaintiffs before the amount of the loss was ascertained or attempted to be ascertained, and before any proceedings were had for appraisal of the loss. The aggregate sum of \$250,000.00 so received on account is substantially less than the amount due to defendant from all the plaintiffs, and the part thereof paid by each plaintiff is substantially less than the amount due from each such plaintiff to the defendant, whether said award be valid or invalid, all of which is conceded by each and all of the plaintiffs.

XII.

Said award is invalid and is not binding upon defendant, because the appraisers in arriving at the award and in fixing the amounts of the loss, the net profits prevented, the fixed charges and continuing expenses, the profits realized by partial operation after the fire, and the fixed charges and continuing expenses recovered by partial operation after the fire, mistook and exceed their authority, clearly misconceived their duties, undertook to construe and misconstrued provisions of the insurance policies, committed and acted upon fundamental and gross errors, both of law and of fact, made their calculations upon unlawful and erroneous bases, and wholly omitted items of loss which were covered and insured by each and every one of said policies of insurance, all of which more particularly appears hereafter.

XIII.

Pursuant to the provision in each of the policies that the insured should resume partial operation of the property described in each policy of insurance and should make use of other property if obtainable, if by so doing the amount of loss would be reduced, and in the event of the loss being so reduced such reduction should be taken into account in arriving at the amount of the loss hereunder, the appraisers and the umpire undertook to fix and ascertain the amount of profit made and realized by the partial operation of its plant and business dur-

ing the nine-month period immediately following the fire, and to deduct the amount so found from the net profits prevented and fixed charges and continuing expenses found by said appraisers. In making said calculation, the appraisers wrongfully, erroneously contrary to the provisions of the policies of insurance, and contrary to law, arbitrarily separated the partial operation of defendant's plant and business succeeding the fire and treated the same as two separate, distinct and unrelated partial operations. They arbitrarily, wrongfully, erroneously, and contrary to law, treated the operation of the box factory as separate and distinct from the logging operation. They fixed the amount of profit resulting from the operation of the box factory, considered as a separate and distinct operation and business, and subtracted the amount of the profit so fixed and ascertained from the amount of profits prevented and fixed charges and continuing expenses. The defendant, as part and parcel of the partial operation after the fire, engaged in logging for the reasons and to the extent heretofore alleged. By reason thereof and by reason of the fact that the logs cut and on hand could not be promptly sawed into lumber, depreciation occurred in said logs because of rot, stain, check and brashness. The amount of such depreciation in said logs which occurred within the nine-month period immediately following the fire was more than \$36,000.00. The appraisers and the umpire did not question the amount of such depreciation, and made no finding

that the same was of a different or less amount, but they wrongfully, erroneously and mistakenly, and contrary to law, failed to allow the amount of this loss and depreciation, and failed to treat it as part of the expense of partial operation after the fire, and wrongfully, erroneously and mistakenly failed to treat said loss of worth in said logs as depreciation within the meaning of the insuring clause of the policy insuring continuing fixed charges and expenses. By wrongfully, erroneously and mistakenly failing to treat said loss of worth in said logs as not constituting depreciation within the meaning of the insurance policies, and by wrongfully, erroneously and mistakenly failing to treat the logging operation as part of the partial operation after the fire, and by wrongfully, erroneously and mistakenly failing to treat said loss in worth of said logs as part of the expense of operation after the fire, the appraisers and the umpire misconstrued their authority and duty, and they committed, grave, gross and fundamental errors of both law and fact.

XIV.

One of the effects of the fire was to cripple and reduce the efficiency of defendant's plant. As a result thereof, it was more expensive for defendant to continue partial operation after the fire. The figures taken from the defendant's books and presented to the appraisers showed that additional expense for logging amounted to more than \$42,000.00. Said expenses were not estimated, but were

actually incurred, the actual amount thereof was correctly entered upon defendant's books, and the correctness of defendant's books and of said figures was not disputed or questioned by the appraisers, and they made no finding that said excessive logging cost was in any different or smaller amount, but they failed to make any allowance on account of said excessive cost of logging. The appraisers thereby misconceived their powers and duties and thereby committed gross error of law and fact.

XV.

The defendant was likewise put to extra expense in its mill and yard operation because of such crippled and inefficient condition in the sum of more than \$15,500.00, all of which was actually incurred and correctly entered upon defendant's books, and which expense constituted continuing expense insured by the policies of insurance. The appraisers did not find that said figures were incorrect and they did not find that said expense was in any different or lesser amount, but they wrongfully failed to allow said amount and thereby committed a gross error.

XVI.

None of the errors above alleged arose in connection with the estimation of the amount of profits prevented, but all arose and occurred in the calculations and findings concerning actual income and outgo after the fire. All had to do with matters which actually occurred, the amounts of which had

been definitely ascertained and correctly entered upon defendant's books. None of said errors occurred on account of any conflict of evidence or on account of any inaccuracy or insufficiency found by the appraisers or the umpire as to any of defendant's books and figures. None occurred as to any item, the amount of which is a mere matter of estimation or judgment, but all occurred because the appraisers and the umpire exceeded their authority in construing terms of the policy of insurance.

XVII.

The appraisers failed to make any agreement as to whether any of the matters or items mentioned in Articles XIII, XIV, and XV of this count of this counterclaim should or should not be allowed as items of loss and damage to defendant, and they disagreed as to whether such items were within the terms of the policies. Instead of referring their differences to the umpire for his decision, they made a compromise agreement and allowed as loss and damage the sum of \$25,000.00 in lieu and instead of all of said three items of loss and damage to defendant's injury in the sum of more than \$68,000.00. Said sum of \$25,000.00 allowed as aforesaid did not represent the judgment or finding of the appraisers, or of the umpire, or of any one of them concerning the amount of said three items of loss and damage, or of any one or more of them, but was the amount on which said appraisers agreed by compromise. Thereby said appraisers

exceeded their authority and committed a gross error. The appraisers entered into a compromise agreement, holding that to be a profit which was not a profit, erroneously treating the logging operation as no part of the partial operation after the fire, construing the partial operation after the fire as two separate and distinct operations, refusing to treat expenses incident to logging and operation of the mill and yard after the fire as a part of the expense of partial operation after the fire, wrongfully construing the loss in worth of the logs after the fire as not being depreciation and therefore not continuing expense within the meaning of the policies and as not a reduction of the amount of profit realized by partial operation after the fire.

XVIII.

The appraisers and the umpire, in calculating the amount of profit made by the operation of the box factory after the fire, wrongfully, erroneously, mistakenly, and contrary to law, deducted from gross income of the box factory the amount for which the lumber used and consumed in the operation of the box factory could have lawfully been sold under O.P.A. ceiling prices, instead of deducting from gross income the cost of such lumber. At the time when the fire occurred, and continuously thereafter during the entire nine-month period insured, O.P.A. ceiling prices were in force and effect on lumber. The United States of America was at war with the governments of Germany and

Japan, and was shipping vast quantities of supplies to Australia, China, certain Pacific Islands, Africa, Iceland, England, Russia, and other parts of the world. There was an unprecedented demand for box shook. The United States Government placed ceiling prices upon lumber which would require lumber suitable to be manufactured into box shook to be sold for less than cost, but placed O.P.A. ceiling prices on box shook which would permit the sale of box shook at a good profit. As a result of said O.P.A. ceiling prices, only a few grades of lumber could be sold at any profit at all, and even such lumber could not be sold at prices which would realize as great a profit as could be realized by the manufacture and sale of box shook. As a result of such O.P.A. ceiling prices, there was no market for lumber suitable for box shook. Such lumber could not be bought in the market or for the prices which might lawfully be paid under O.P.A. regulations. There is no difference in the actual cost of producing lumber which is sold after it has passed through the saw mill or after it has passed through the saw mill and the planing mill, and lumber which is used for the manufacture of box shook. During the entire nine-month period following the fire lumber to be used for the manufacture of box shook was of greater value to defendant than lumber to be sold after it had passed through the saw mill and the planing mill because, under O.P.A. ceiling prices, a greater profit could be made upon the lumber manufactured into box shook. O.P.A. ceiling prices

did not represent and were not intended to represent either the cost or value of lumber suitable to be manufactured into box shook, but said O.P.A. ceiling prices were far below the actual cost of the manufacture of said lumber, and applicable to all lumber of like kind and character without regard to the cost thereof to the owner. In the transaction of its regular business defendant did not sell any of its lumber suitable for the manufacture of box shook and never, at any time, contracted with any of the plaintiffs to do so, or to charge itself with the loss that would have been incurred by doing so.

XIX.

Defendant, in making its proof of loss and in presenting its figures for the consideration of the appraisers and the umpire, ascertained the entire cost of the production of lumber, both that which was and that which was not used for the manufacture of box shook, and in computing the profit made by the operation of the box factory, deducted the cost of the lumber consumed in the manufacture of box shook from the gross income from the operation of the box factory. For that purpose defendant used average cost of lumber, notwithstanding the fact that a greater average profit could be made (calculated upon that basis) by using lumber for the manufacture of box shook, than the average profit (calculated upon such basis) from the sale of both lumber and box shook. The appraisers and umpire did not find that defendant had incorrectly computed such average cost. Nevertheless, in com-

puting the cost of lumber used in the box factory, they treated O.P.A. ceiling prices on all lumber used for the manufacture of box shook as the cost thereof. By reason thereof, they found the profit made by the operation of the box factory in the nine months immediately succeeding the fire to be more than \$73,000.00 in excess of the actual profit made thereby, and thus reduced the amount of the actual loss found by them by that amount. In so doing, the appraisers and the umpire wrongfully, erroneously and mistakenly construed Section 10 of each of the policies of insurance, thereby exceeding their authority, and committing grave, gross and fundamental mistakes of both law and fact.

XX.

Section 4 of each of the policies issued by the plaintiffs to the defendant was as follows:

“ ‘Contribution Clause’—It is expressly stipulated and made a condition of this contract that, in the event of loss, this company shall be liable for no greater proportion thereof than the amount hereby insured bears to seventy five per cent (75%) of the total of the net profits (Item I) and charges and expenses (as specified in Item II) which would normally have been earned during the period of twelve (12) months immediately following the fire.”

The phrase “as specified in Item II)” appearing in said contribution clause refers to Item II in the insuring clause in each of said policies which, by its express terms, refer, not to all charges and ex-

penses which would occur during a normal year, but only to fixed charges and expenses which must necessarily continue during a total or partial suspension of business.

In attempting to follow the provisions of said Section 4 of said policies, the appraisers, in arriving at the fixed charges and expenses which would normally have been earned during the period of twelve months immediately following the fire, included in said amount the sum of \$15,042.00 which was the amount which the appraisers determined would have been the depreciation on the destroyed saw mill in the year following the date when the fire occurred had no fire occurred. Said saw mill was destroyed by fire, which fact said appraisers knew and found to be a fact, and no depreciation in fact occurred upon said saw mill after it was burned and destroyed, which fact was likewise known to the appraisers. The appraisers allowed nothing by way of damage on account of any part of said depreciation on said destroyed saw mill as a fixed charge or continuing expense, but held that the amount thereof that would have occurred in nine months was recovered in the logging operation after the fire, whereas no depreciation was ever recovered by defendant. The appraisers added said sum of \$15,042.00 to the amount of fixed charges and expenses during the period of twelve months immediately following the fire because said Section 4 referred to charges and expenses which would normally have been earned during said twelve

months, and they construed this provision concerning what would normally have occurred to require them to include said depreciation in said twelve-month period, notwithstanding the fact that no depreciation whatsoever occurred upon said sawmill, during either the nine months or the twelve months immediately following the fire. The appraisers overlooked and ignored the fact that said Section 4 referred only to charges and expenses which must necessarily continue during partial suspension of business, as specified in Item II of the insuring clause. In the manner aforesaid, the appraisers misconstrued said policies of insurance and exceeded their authority and committed a gross error of law. The effect of misconstruing said policy and erroneously adding said sum of \$15,042.00 to the amount of fixed charges and expenses for said twelve-month period was to raise the total amount of the net profits and charges and expenses for the twelve-month period following the fire to such an extent that the amount of damage, as found by the commissioners for which defendant could recover under the provisions of said contribution clause, was reduced more than \$7,000.00.

XXI.

By reason of the fundamental, gross, and palpable errors of law and fact, by reason of the fact that the appraisers and the umpire exceeded their authority in construing terms of the insurance policies, in misconstruing said policies, and in entering into a compromise agreement, and by reason of the fact

that the award does not allow for all the items of loss, said award is invalid and void.

Wherefore, defendant prays that the award rendered and returned by the appraisers and the umpire be declared invalid and that it be vacated and set aside.

Count II

I.

Defendant adopts by reference paragraphs I, II, and III of the complaint herein.

II.

In consideration of a premium paid to each plaintiff respectively by defendant, each of the plaintiffs did, in the State of California, on or about April 30, 1945, issue and deliver to defendant the policy or policies of insurance known as use and occupancy or business interruption insurance. A copy of the policy of insurance so issued by plaintiff, The Home Insurance Company, is attached to the complaint herein, Marked Exhibit A and B, and is made a part hereof and adopted by reference. Each of said policies of insurance was identical in form and substance to said policy issued by plaintiff, The Home Insurance Company, except as to the name of the company issuing the policy, the signatures thereto, the amount of insurance, the identifying number of and the amount of insurance provided for. The identifying number of and the amount of insurance provided for in each of said policies (as of July 7, 1945) are set forth in Article II of Count

I of this counterclaim, which Article is hereby adopted by reference.

III.

The total amount of insurance provided for, as of July 7, 1945, in and by all of said policies is the aggregate sum of \$651,000.00. At the time of the fire hereinafter mentioned, defendant carried no use and occupancy or business interruption insurance other than, or in addition to, the insurance evidenced by the policies last above mentioned.

IV.

There is diversity of citizenship as between the defendant and each and every one of the plaintiffs and the amount in controversy in this suit, exclusive of interest and costs, as between defendant and each and every one of the plaintiffs, exceeds \$3,000.00.

V.

Defendant asserts against each of the plaintiffs severally right to relief in respect of and arising out of the same occurrence, namely, the fire and loss resulting therefrom hereinafter mentioned, and questions of both law and fact common to all of them will arise in this action within the meaning of Rule 20 of the Federal Rules of Civil Procedure.

VI.

It was and is a condition of each policy issued by plaintiffs to defendant that if the buildings and/or structures and/or machinery and/or equipment and/or supplies and/or all that property upon

which the printed conditions of the policy require that liability be specifically assumed in, on and/or under "plant site," "Athletic field" and "town site" premises situate at and near Standard, Tuolumne County, California, and occupied or used for woodworking or mercantile, or for any other purposes, including (but not limited to) town site purposes or purposes incidental or related to such woodworking or mercantile operations, be destroyed or damaged by fire occurring during the term of the policy so as to necessitate a total or partial suspension of business, the company issuing the policy shall be liable under such policy for any such actual loss sustained by reason of such suspension.

VII.

By each policy, the plaintiff who issued the same insured defendant to an amount not exceeding the face amount of said policy against loss occurring during the term of the policy consisting of (Item 1) the net profits on the business which is thereby prevented; and (Item 2) fixed charges and expenses, to the extent to which they would have been earned had no fire occurred, as follows: Salaries of indispensable employees, superintendents, executives, salesmen and/or employees under contract, taxes, interest, rents, royalties, insurance premiums, depreciation, advertising, special contracts, dues, subscriptions, directors' fees, accounting expenses, legal expenses and fees, light, heat and power, and such other fixed charges and expenses which must neces-

sarily continue during total or partial suspension of business.

VIII.

Each policy provided that any income derived from or expenses incurred in the store and townsite operation of the insured are not covered by the policy and such income and expenses shall not be considered in the application of the average clause made a part thereof; that the length of time of such suspension for which loss may be claimed shall not exceed 75% of 365 calendar days, shall not exceed such length of time as would be required with due diligence and dispatch to rebuild, repair or replace such property therein described as may have been destroyed or damaged and shall commence with the date of the fire and not be limited by the date of expiration of the policy.

IX.

Each policy provided that in the event of loss the company issuing the policy shall be liable for no greater proportion thereof than the amount thereby insured bears to 75% of the total of the net profits (Item I) and charges and expenses (as specified in Item II) which would normally have been earned during the period of twelve months immediately following the fire; that the company issuing the policy should not be liable, as to net profits, for more than the net profits prevented by the total or partial suspension of business, nor for charges and expenses in excess of those which must

necessarily continue during a total or partial suspension of business, and then only to the extent to which such charges and expenses would have been earned had no fire occurred; but nevertheless said company shall be liable for such expenses as may be incurred for the purpose of reducing any loss under the policy, not exceeding, however, the amount in which the loss is so reduced; that in determining the amount of net profits and charges and expenses that would have been earned had no fire occurred, whether for the purpose of ascertaining the amount of loss sustained or in the application of the contribution clause, due consideration shall be given to the experience of the business before the fire and the probable experience thereafter; that the word "day," however modified, wherever used in the policy, shall be held to cover a period of twenty-four hours.

X.

Each policy provides that, as soon as practicable after any loss, the insured shall resume complete or partial operation of the property therein described and shall make use of other property, if obtainable, if by so doing the amount of loss thereunder will be reduced, and in the event of the loss being so reduced such reduction shall be taken into account in arriving at the amount of loss thereunder; that the company issuing the policy shall in no event be liable for loss resulting from damage to or destruction of finished stock or for the time required to reproduce any finished stock which

may be damaged or destroyed; that if liability for suspension of business due to damage to or destruction of raw stock is specifically assumed thereunder, such liability shall be limited to that period of time for which the damaged or destroyed raw stock would have made operations possible, but in no event to exceed the time limit therein specified.

XI.

Each policy provided that the total liability for business interruption loss caused by fire and/or consequential damage shall in no case exceed the total amount of said policy in effect at the time of the loss.

XII.

Each policy provided that after the commencement of the fire, the insured shall render the company that issued the policy preliminary proof of loss consisting of a written statement signed and sworn to by assured, setting forth (a) his knowledge and belief as to the origin of the fire, (b) the interest of the insured and of all others in the property, (c) the cash value of the different articles or properties and the amount of loss thereon, (d) all encumbrances thereon, (e) all other insurance, whether valid or not, covering any of said articles or properties, (f) a copy of the descriptions and schedules in all other policies unless similar "to this policy" and in that event a statement as to the amounts for which the different articles or properties are insured in each of the other policies, (g)

any changes of title, use, occupation, location or possession of said property since the issuance "of this policy," (h) by whom and for what purpose any building therein described and the several parts thereof were occupied at the time of the fire; that if the insurance company claims that the preliminary proof of loss is defective and within five days after the receipt thereof notifies in writing the insured of the alleged defect and requests that they be remedied by verified amendments, the insured within ten days after receipt of such notification and request must comply therewith or if unable to do so present to the insurance company an affidavit to that effect; that the company issuing the policy shall be deemed to have assented to the amount of the loss claimed by insured in his preliminary proof of loss unless within twenty days after receipt thereof, or if verified amendments have been requested, within twenty days after their receipt, or within twenty days after the receipt of an affidavit that the insured is unable to furnish such amendments, the company issuing the policy shall notify the insured in writing of its partial or total disagreement with the amount of loss claimed by him and shall also notify him in writing of the amount of loss, if any, the company admits on each of the different articles or properties set forth in the preliminary proof or amendments thereto; that if the insured and the company issuing the policy fail to agree in whole or in part as to the amount of loss within ten days after such notifica-

tion, the company issuing the policy shall forthwith demand in writing an appraisement of the loss or part of loss as to which there is disagreement and shall name a competent and disinterested appraiser and insured within five days after receipt of such demand and name shall appoint a competent and disinterested appraiser and notify the company thereof in writing and the two so chosen shall before commencement of the appraisement select a competent and disinterested umpire; that the appraisers together shall estimate and appraise the loss or part of loss as to which there is a disagreement, stating separately the sound value and damage, and if they fail to agree they shall submit their differences to the umpire and the award in writing, duly verified by any two, shall determine the amount or amounts of such loss.

XIII.

At the time that each of such policies was issued and continually thereafter defendant was the owner of the premises and properties described in each of said policies. At the time that each of said policies was issued, and continuously thereafter until the date of the fire hereafter mentioned, defendant was engaged in the business of manufacturing and selling lumber and lumber products, and as an incident to such business it owned large amounts of standing timber, together with equipment necessary and appropriate for cutting, transporting and handling the same upon the location

described in each of said policies. Defendant owned and operated a lumber manufacturing plant, including a saw mill, a planing mill and a box factory, (all located on the premises described in each policy) which defendant regularly used in its business for the purpose of manufacturing lumber and lumber products.

XIV.

On the evening of July 7, 1945, a fire occurred on the premises described in each of said policies which damaged and destroyed the saw mill which was part of the property described in each of said policies, so as to necessitate a suspension of defendant's business. By reason of such suspension defendant sustained actual loss consisting of the net profits on defendant's business which were prevented by such fire and suspension of business, and of fixed charges and expenses defined in "Item II" in each of said policies, which fixed charges would have been completely earned by defendant had no fire occurred, in the following amounts:

	During Nine Months Immediately Succeeding the Fire	During Twelve Months Immediately Succeeding the Fire
Profits Prevented	\$266,241.60	\$358,458.56
Fixed Charges and Expenses	538,927.93	646,190.47
Totals.....	\$805,169.53	\$1,004,649.03

XV.

Defendant rebuilt, repaired and replaced the property so damaged and destroyed with due diligence and dispatch. The time required for such

rebuilding, repair and replacement exceeded one year, and said rebuilding, repair and replacement could not have been effected in a shorter length of time.

XVI.

Said fire did not prevent defendant's logging operation nor destroy said box factory. After said fire defendant had on hand a large amount of lumber which had been produced by running logs through defendant's saw mill, which lumber was suitable for use in said box factory for the manufacture of box shooks. Wherefore, pursuant to the provision in each of said policies, that insured should resume complete or partial operation of the property and should make use of other property, if obtainable, if by so doing the amount of loss under the policy would be reduced, defendant, as soon as practicable after said fire and said loss, resumed partial operation of said property described in each policy and partial operation of its business by continuing its logging and the operation of its said box factory, made use of said lumber suitable for the manufacture of box shooks, and by said partial operation defendant made a profit of \$63,165.12. The net loss to defendant during the nine months immediately succeeding said fire, and on account of said fire, and sustained by reason of the partial suspension of defendant's business necessitated by the destruction and damage of defendant's property by said fire, as reduced by said partial operation was and is in excess of \$742,004.41.

XVII.

By reason of the facts hereinabove stated, the amount which defendant is entitled to recover under all of said policies is in excess of the sum of the face value of all of said policies, and each plaintiff thereby became and is liable to defendant for the full face amount of the policy or policies issued by it.

XVIII.

On March 7, 1946, each of the plaintiffs made a payment to defendant in part payment of its liability to defendant upon the policy or policies issued by each plaintiff respectively. The number of the policy, the face amount thereof, the amount of said partial payment and the balance due from each defendant (exclusive of interest thereon) is as follows:

Policy No.	Name of Insurance Company	Face Amount of Policy	Advance Payment on Claim March, 1946	Balance Claimed
027885	The American Insurance Co.	\$ 5,000.00	\$ 1,920.12	\$ 3,079.
S-705012	Atlas Assurance Company, Ltd.	20,000.00	7,680.49	12,319.
134336	Caledonian Insurance Company	38,750.00	14,880.95	23,869.
834784	The Camden Fire Insurance Association	17,500.00	6,720.43	10,779.
400443	Columbia Insurance Company of New York	8,000.00	3,072.20	4,927.
923047	Commercial Union Assurance Company, Limited	25,000.00	9,600.61	15,399.
645621	The Continental Insurance Co...	25,000.00	9,600.61	15,399.
PF-63798	Fire Association of Philadelphia	10,000.00	3,840.25	6,159.
A-34562	Fireman's Fund Insurance Co...	17,000.00	6,528.42	10,471.
29455	Firemen's Insurance Company of Newark, New Jersey	15,000.00	5,760.37	9,239.
PCF 448625	Glens Falls Insurance Company	40,000.00	15,360.98	24,639.
38917	Globe and Rutgers Fire Insurance Company	5,000.00	1,920.12	3,079.

Key No.	Name of Insurance Company	Face Amount of Policy	Advance Payment on Claim March, 1946	Balance Claimed
4	Great American Insurance Company	20,250.00	7,776.50	12,473.50
51	The Hanover Fire Insurance Co.	10,000.00	3,840.25	6,159.75
18	Hartford Fire Insurance Co.....	10,000.00	3,840.25	6,159.75
7	The Home Insurance Company..	15,000.00	5,760.37	9,239.63
00	Insurance Company of North America	7,500.00	2,880.18	4,619.82
457353	Insurance Company of North America	15,000.00	5,760.37	9,239.63
90	National Fire Insurance Com- pany of Hartford	32,625.00	12,528.80	20,096.20
79	National Liberty Insurance Company of America	16,800.00	6,451.61	10,348.39
14	National Union Fire Insurance Company of Pittsburg, Pa.	15,000.00	5,760.37	9,239.63
8	New Hampshire Fire Insurance Company	30,000.00	11,520.74	18,479.26
56	New York Underwriters Insurance Company	20,000.00	7,680.49	12,319.51
93	New Zealand Insurance Company, Limited	25,000.00	9,600.61	15,399.39
1058	The Northern Assurance Company, Limited	32,125.00	12,336.79	19,788.21
6	Norwich Union Fire Insurance Society, Limited	12,500.00	4,800.31	7,699.69
48	Pearl Assurance Company, Ltd.	10,000.00	3,840.25	6,159.75
46	The Pennsylvania Fire Insur- ance Company	15,000.00	5,760.37	9,239.63
515	Queen Insurance Company of America	32,750.00	12,576.81	20,173.19
78	St. Paul Fire & Marine Insur- ance Company	5,000.00	1,920.12	3,079.88
436	Scottish Union and National Insurance Company	5,000.00	1,920.12	3,079.88
53	Security Insurance Company of New Haven	25,000.00	9,600.61	15,399.39
51	Springfield Fire and Marine Insurance Company	10,000.00	3,840.25	6,159.75
26	The Travelers Fire Insurance Company	17,500.00	6,720.43	10,779.57
2793	United States Fire Insurance Company	20,200.00	7,757.30	12,442.70
18	Westchester Fire Insurance Co..	15,000.00	5,760.37	9,239.63
679	The Western Assurance Co.....	7,500.00	2,880.18	4,619.82
Totals.....		\$651,000.00	\$250,000.00	\$401,000.00

XIX.

Each plaintiff agreed with defendant that defendant might have more time than that fixed by the policy within which to render to plaintiffs preliminary proof of loss, and within the extended time so allowed and agreed upon, defendant rendered to each and all of the plaintiffs preliminary proof of loss executed and containing the allegations and information as required by each of said policies of insurance.

XX.

By each proof of loss, defendant made claim of loss in the total amount of \$742,004.41 and claimed that the liability of all the plaintiffs to defendant was in the aggregate sum of \$651,000.00.

XXI.

Defendant adopts paragraphs VIII and IX of the complaint herein by reference.

XXII.

Plaintiffs and defendant failed to agree within ten days after said notice of disagreement as to the amount of the loss. On or about February 21, 1947, and within the time provided by each of said policies of insurance, plaintiffs jointly demanded in writing an appraisement, but otherwise pursuant to the terms of each of said policies and jointly named a single appraiser. Defendant thereupon appointed a single appraiser. The two appraisers so chosen,

before commencing the appraisement, selected an umpire.

XXIII.

Defendant adopts paragraph XI of the complaint herein by reference.

XXIV

Said award is invalid. Defendant has instituted an action in this court and in this cause, as set forth in Count I of defendant's counterclaim to procure a decree of this court that said award is invalid and that the same be vacated.

Wherefore, defendant prays:

1. That the Second Count of defendant's counterclaim be tried to a jury after Count I of this counterclaim has been tried to the court, and after said award has been held to be invalid and vacated by the decree of this Court;

2. That defendant have and recover judgment against each of the plaintiffs severally in amounts as follows:

The American Insurance Company	\$ 3,079.88
Atlas Assurance Company, Limited	12,319.51
Caledonian Insurance Company	23,869.05
The Camden Fire Insurance Association	10,779.57
Columbia Insurance Company of New York	4,927.80
Commercial Union Assurance Company, Limited	15,399.39
The Continental Insurance Company	15,399.39
Fire Association of Philadelphia	6,159.75
Fireman's Fund Insurance Company	10,471.58
Firemen's Insurance Company of Newark, New Jersey	9,239.63
Glens Falls Insurance Company	24,639.02
Globe and Rutgers Fire Insurance Company	3,079.88
Great American Insurance Company	12,473.50
The Hanover Fire Insurance Company	6,159.75
Hartford Fire Insurance Company	6,159.75
The Home Insurance Company	9,239.63
Insurance Company of North America	4,619.82
Insurance Company of North America	9,239.63
National Fire Insurance Company of Hartford	20,096.20
National Liberty Insurance Company of America	10,348.39
National Union Fire Insurance Company of Pittsburg, Pa.	9,239.63
New Hampshire Fire Insurance Company	18,479.26
New York Underwriters Insurance Company	12,319.51
New Zealand Insurance Company, Limited	15,399.39
The Northern Assurance Company, Limited	19,788.21
Norwich Union Fire Insurance Society, Limited	7,699.69
Pearl Assurance Company, Limited	6,159.75
The Pennsylvania Fire Insurance Company	9,239.63
Queen Insurance Company of America	20,173.19
St. Paul Fire & Marine Insurance Company	3,079.88
Scottish Union and National Insurance Company	3,079.88
Security Insurance Company, of New Haven	15,399.39
Springfield Fire and Marine Insurance Company	6,159.75
The Travelers Fire Insurance Company	10,779.57
United States Fire Insurance Company	12,442.70
Westchester Fire Insurance Company	9,239.63
The Western Assurance Company	4,619.82

Defendant also prays judgment against each plaintiff for interest at the rate of Seven Per Cent (7%) per annum on \$401,000.00 from the date when due in accordance with the provisions of said policies and pursuant to law, until said judgment is paid, said interest to be apportioned among the

several plaintiffs in proportion to the several judgments rendered against them.

3. Defendant further prays judgment against all of the plaintiffs for the costs of this suit.

SEVERSON, BROWN,
KEOUGH & McCALLUM,
WATSON, ESS, BARNETT,
WHITTAKER & MARSHALL
and
PAUL BARNETT,

By /s/ HAROLD C. BROWN,
Attorneys for Defendant.

Demand For A Trial By Jury

Defendant demands a trial by jury of all issues of fact arising in the trial herein, except as to Count I of defendant's counterclaim as provided by Rule 38(b) of the Federal Rules of Civil Procedure.

SEVERSON, BROWN,
KEOUGH & McCALLUM,
WATSON, ESS, BARNETT,
WHITTAKER & MARSHALL
and
PAUL BARNETT,

By /s/ HAROLD C. BROWN,
Attorneys for Defendant.

Receipt of copy attached.

[Endorsed]: Filed April 30, 1948.

[Title District Court and Cause.]

REPLY TO COUNTERCLAIM

(In Second Amended Answer)

For reply to the counterclaim contained in defendant's second amended answer and counterclaim, plaintiffs say:

First Defense

The counterclaim, and each count thereof, fails to state any defense, claim, or counterclaim against plaintiffs, or any of them, upon which relief can be granted.

Second Defense

First Count of Counterclaim:

1. Plaintiffs admit the allegations contained in paragraphs I, II, III, VI, VII, VIII, and XI.

2. Plaintiffs deny the allegations contained in paragraphs XII, XVI, and XXI.

3. Plaintiffs are without knowledge or information sufficient to form a belief as to the allegations of paragraph XVII.

4. As to the allegations of paragraph IV: Plaintiffs admit that at approximately five o'clock in the afternoon on July 7, 1945, said saw mill was destroyed by fire which caused a complete suspension of business by defendant for a few days and caused a complete suspension of the operation of the saw

mill for more than one year thereafter; that at the time of the fire defendant had on hand a large amount of lumber which it had procured by running its logs through its saw mill and which lumber was suitable for being used in said box factory for the manufacture of box shooks; that defendant made inquiries concerning the procurement of machinery, equipment and materials for rebuilding the saw mill, and from the information acquired it appeared that one side of the saw mill could be rebuilt and put into operation within less than nine months of the date of the fire, thus permitting partial operation of the saw mill within the term insured by the policy; that the timber owned by defendant is in mountainous country and in the winter months snow prevents the cutting of logs or the hauling of logs from the woods; that defendant did cut additional logs after the fire and before such time as such operations would be halted by snow, and did haul logs from the woods which had resulted from cutting timber before the fire occurred, and did deck them at defendant's plant site, and that such decking did arrest deterioration, decay, check and depreciation of said logs already cut; that defendant continued to cut logs in the woods and to transport such logs, together with the logs which had already been cut before the fire occurred, from the woods to its plant site; that defendant's log pond was not large enough to receive so great a supply of logs, and that defendant did deck a great many of said logs at the plant site, and that this decking of logs

occassioned expense to defendant; that defendant also resumed partial operation by operating its box factory, and for that purpose used all of its supply of lumber suitable for the manufacture of box shòok.

Plaintiffs deny that any policy issued by plaintiffs provided as stated in the second sentence of said paragraph IV, or provided other than as stated in the policies themselves.

Plaintiffs deny every allegation of said paragraph IV not hereinabove expressly admitted.

5. As to the allegations of paragraph V: Plaintiffs admit that defendant ceased its logging operations prior to expiration of nine months from the date of the fire, but continued to operate its box factory until all of its lumber available for the manufacture of box shòok was consumed.

Plaintiffs deny every allegation of said paragraph V not hereinabove expressly admitted.

6. As to the allegations of paragraph IX: Plaintiffs admit the allegations of said paragraph IX, except that plaintiffs deny that in any respect the appraisers or umpire acted otherwise than pursuant to and in accordance with the provisions of each of said policies of insurance. In this connection, plaintiffs allege that the holding of a single appraisalment and the actions of the appraisers and umpire in this regard were in all respects and at all times consented and agreed to and acquiesced in by defendant.

7. As to the allegations of paragraph X: Plaintiffs admit and allege that the proceeding for ascertainment of the loss through the appraisers and umpire herein was had pursuant to the provisions of the said policies of insurance; that the appraisers and umpire gave defendant as well as plaintiffs full opportunity to present all evidence, figures, explanations, arguments, and data and information of whatever kind, which either desired to present, and held hearings for that purpose upon notice to all parties; that defendant did not request that any subpoena or subpoenas be issued during the course of the appraisalment or in connection therewith; that defendant offered no objection or exception to the proposition expressed during the course of the appraisalment that the appraisers and umpire were not confined to the information received at the hearing but could inform themselves in any legitimate manner and from any legitimate source they saw fit; that those who appeared and testified for defendant and plaintiffs at the said hearings were not sworn. In this connection, plaintiffs allege that the actions and procedures of the appraisers and umpire hereinbefore referred to were in all respects and at all times consented and agreed to and acquiesced in by defendant.

Plaintiffs are without knowledge or information sufficient to form a belief as to the allegations of the last two sentences of said paragraph X, commencing "The appraisers and umpire did not . . .", and ending "... consulted ex parte."

Plaintiffs deny every allegation of said paragraph X not hereinabove expressly admitted.

8. As to the allegations of paragraph XIII: Plaintiffs are without knowledge or information sufficient to form a belief as to the allegations of said paragraph XIII; except that plaintiffs admit that defendant, as part and parcel of the partial operation after the fire, engaged in logging, and that the logs cut and on hand could not be promptly sawed into lumber, and that some small amount of depreciation may have occurred in said logs because of rot, stain, check, and brashness, but defendant denies that the amount of such depreciation in said logs which occurred within the nine-month period immediately following the fire was more than \$36,000, or exceeded a nominal amount, and plaintiffs allege that the minor amount of depreciation that may have occurred was either irrelevant because absorbed by the market conditions then and subsequently in existence or was a consequential loss not covered by the said policies of insurance.

9. As to the allegations of paragraph XIV: Plaintiffs admit that one of the effects of the fire was to cripple and reduce the efficiency of defendant's plant, and that as a result thereof it was more expensive for defendant to continue partial operation after the fire.

Plaintiffs are without knowledge or information sufficient to form a belief as to the allegations of the

last seven lines of said paragraph XIV, commencing "and the correctness . . .", and ending "... gross error of law and fact."

Plaintiffs deny every allegation of said paragraph XIV not hereinabove expressly admitted.

10. As to the allegations of paragraph XV: Plaintiffs are without knowledge or information sufficient to form a belief as to the allegations of the last sentence of said paragraph XV, commencing "The appraisers . . .", and ending "... a gross error."

Plaintiffs deny every other allegation of said paragraph XV.

11. As to the allegations of paragraph XVIII: Plaintiffs are without knowledge or information sufficient to form a belief as to the allegations of the first sentence of said paragraph XVIII, commencing "The appraisers . . .", and ending "... cost of such lumber."; and as to the allegations contained in the last sentence on page 16, commencing "The United States . . .", and ending "... parts of the world.", except that plaintiffs admit that the United States was at war with the governments of Germany and Japan; and as to the allegations contained in the sentence about the middle of page 17, reading "Such lumber could not be bought in the market or for the prices which might lawfully be paid under O.P.A. regulations."

Plaintiffs admit that at the time when the fire occurred, and continuously thereafter during the

entire nine-month period insured, O.P.A. ceiling prices were in force and effect on lumber; that there was an unprecedented demand for box shook; that the United States government placed O.P.A. ceiling prices on box shook which would permit the sale of box shook at a good profit, and that generally other grades of lumber could not be sold at prices which would realize as great a profit as could be realized by the manufacture and sale of box shook; that during the entire nine-month period following the fire, lumber to be used for the manufacture of box shook was of greater value to defendant than lumber to be sold after it had passed through the saw mill and the planing mill because under O.P.A. ceiling prices a greater profit could be made upon the lumber manufactured into box shook, and in this connection plaintiffs allege that the additional profit to be made upon lumber manufactured into box shook resulted from the fact of the re-manufacturing process and would result and did result regardless of whether market prices were under government control or not; that in the transaction of its regular business defendant did not sell any of its lumber suitable for the manufacture of box shook and never at any time contracted with any of the plaintiffs to do so or to charge itself with any loss that might be so incurred, and in this connection plaintiffs allege that the reason that defendant did not in the transaction of its regular business sell lumber suitable for the manufacture of box shook was because defendant had a substan-

tial investment in its box factory and therefore wished to keep it in operation at all times so as to earn interest on its investment and the overhead incident to its maintenance and the profit to be made from the process of re-manufacture carried on therein.

Plaintiffs deny every allegation of said paragraph XVIII not hereinabove expressly admitted.

12. As to the allegations of paragraph XIX: Plaintiffs admit that in making its proof of loss and in presenting its figures for the consideration of the appraisers and umpire defendant used average cost of lumber, and in this connection plaintiffs allege that such use was improper and unjustified.

Plaintiffs are without knowledge or information sufficient to form a belief as to the allegations of said paragraph XIX not hereinabove expressly admitted.

13. As to the allegations of paragraph XX: Plaintiffs admit that each of the policies of insurance contained the "Contribution Clause" as quoted in said paragraph XX; that said saw mill was destroyed by fire; and that no depreciation in fact occurred on said saw mill after it was burned and destroyed; and that the appraisers and umpire knew these facts.

Plaintiffs deny the allegations contained in the second paragraph of said paragraph XX, commencing "The phrase . . .", and ending "... partial

suspension of business.”, and deny that any of said policies of insurance provided other than as stated in the policies themselves.

Plaintiffs are without knowledge or information sufficient to form a belief as to the remaining allegations of said paragraph XX.

Second Count of Counterclaim:

14. Plaintiffs admit the allegations contained in paragraphs I, II, III, IV, V, XIII, XIX, XX, XXI, and XXIII.

15. Plaintiffs deny the allegations contained in paragraphs VI, VII, VIII, IX, X, XI, and XII; and in this connection plaintiffs deny that any policy issued by plaintiffs provided other than as stated in the policies themselves.

16. Plaintiffs deny the allegations contained in paragraph XXIV.

17. As to the allegations of paragraph XIV: Plaintiffs admit that on the evening of July 7, 1945, a fire occurred on the premises described in each of said policies which damaged and destroyed the saw mill which was part of the property described in each of said policies, so as to necessitate a suspension of defendant's business.

Plaintiffs deny every allegation of said paragraph XIV not hereinabove expressly admitted; and in this connection, plaintiffs deny that the total of the profits prevented and fixed charges and expenses for the period of twelve months immediately suc-

ceeding the fire was an amount in excess of \$954,249.02, and for the period of nine months immediately succeeding the fire was an amount in excess of \$651,739.56.

18. As to the allegations of paragraph XVI: Plaintiffs admit that said fire did not prevent defendant's logging operation nor destroy said box factory; that after said fire defendant had on hand a large amount of lumber which had been produced by running logs through defendant's saw mill, which lumber was suitable for use in said box factory for the manufacture of box shooks; and that defendant, after the said fire, resumed partial operation of said property described in each policy and partial operation of its business by continuing its logging and the operation of its said box factory, and made use of said lumber suitable for the manufacture of box shooks.

Plaintiffs deny every allegation of said paragraph XVI not hereinabove expressly admitted; and in this connection, plaintiffs allege that by the partial operations aforesaid, defendant earned a credit to net profits and fixed charges for the nine-month period following the fire (which net profits and fixed charges, as alleged in paragraph 17 immediately hereinabove, did not exceed the total amount of \$651,739.56) in the amount of \$185,479.73, and plaintiffs deny that the net loss to defendant during the nine months immediately succeeding said fire, or on account of said fire, or sustained by reason of the partial suspension of defendant's business

necessitated by the destruction and damage of defendant's property by said fire, as reduced by said partial operation, was or is in excess of \$466,259.83.

19. As to the allegations of paragraph XVII: Plaintiffs deny every allegation of said paragraph XVII; and in this connection, plaintiffs deny that by reason of the facts stated in the second count of said counterclaim, or by reason of any facts whatever, the amount which defendant is entitled to recover under all of said policies is in excess of \$424,117.31, and plaintiffs deny that each plaintiff became or is liable to defendant for any amount or amounts in excess of that proportion of the liability of all plaintiffs (\$424,117.31) which the face amount of the policy of each plaintiff bears to \$651,000.00, less payments heretofore made by each plaintiff to defendant as shown in Column "C" of Exhibit "C" attached to plaintiffs' complaint herein.

20. As to the allegations of paragraph XVIII: Plaintiffs admit the allegations of said paragraph XVIII, except as to the amount or amounts of purported "balance due" or "Balance Claimed" as shown in the last column of the tabulation contained in said paragraph XVIII.

21. As to the allegations of paragraph XXII: Plaintiffs admit the allegations of said paragraph XXII, except that plaintiffs deny that in any respect the appraisers or umpire acted otherwise than pursuant to and in accordance with the provisions

of each of said policies of insurance. In this connection, plaintiffs allege that the holding of a single appraisal and the actions of the appraisers and umpire in this regard were in all respects and at all times consented and agreed to and acquiesced in by defendant.

Wherefore, plaintiffs pray that defendant's counterclaim be dismissed with costs.

BERT W. LEVIT,

LONG & LEVIT,

By /s/ BERT W. LEVIT,

Attorneys for Plaintiffs.

Receipt of copy acknowledged.

[Endorsed]: Filed June 10, 1948.

[Title of District Court and Cause.]

AMENDMENT TO REPLY TO
COUNTERCLAIM

(In Second Amended Answer)

Plaintiffs hereby amend, as of course, their reply to the counterclaim contained in defendant's second amended answer and counterclaim, as follows:

I.

Plaintiffs amend paragraph 8 of said reply, so that said paragraph 8 shall cease to read as formerly written and shall read in whole as follows:

8. As to the allegations of paragraph XIII: Plaintiffs are without knowledge or information sufficient to form a belief as to the allegations of said paragraph XIII; except that plaintiffs admit that defendant, as part and parcel of the partial operation after the fire, engaged in logging, and that the logs cut and on hand could not be promptly sawed into lumber, and that some small amount of depreciation may have occurred in said logs because of rot, stain, check, and brashness, but defendant denies that the amount of such depreciation in said logs which occurred within the nine-month period immediately following the fire was more than \$36,000, or exceeded a nominal amount, and plaintiffs allege that the minor amount of depreciation that may have occurred was irrelevant because absorbed by the market conditions then and subsequently in existence and because the said continuance of logging operations by defendant resulted in defendant obtaining a surplus quantity of logs to defendant's financial benefit in an amount far in excess of any possible depreciation that may have occurred and of any extra cost of decking that may have been incurred by defendant.

Dated: San Francisco, 15 June, 1948.

BERT W. LEVIT,

LONG & LEVIT,

By /s/ BERT W. LEVIT,

Attorneys for Plaintiffs.

Receipt of copy acknowledged.

[Endorsed]: Filed June 15, 1948.

In the District Court of the United States for the
Northern District of California, Southern Division

No. 27299-H

THE AMERICAN INSURANCE COMPANY,
et al.,

Plaintiffs,

vs.

PICKERING LUMBER CORPORATION, a corporation,

Defendant.

Erskine, District Judge.

MEMORANDUM OPINION

In determining the issues involved herein several considerations should be borne in mind:

1. That there is no claim that the referees appointed to make the appraisal or arbitration were guilty of any fraud, actual or constructive, misconduct, bias, or partiality; or, that they did not attempt to be fair and equitable and do full justice in the task assigned to them; or that they lacked competence or sufficient qualifications to deal with the complexities involved in such task. It is clear from the record that they were well qualified and competent to undertake this work.

2. That the award made was not only joined in but advocated by the referee appointed by the defendant.

3. That the presumption is that the decision and award of the referees was correct and valid.

4. That the proof of loss filed by the defendant claimed a loss in excess of \$742,000.00 and set forth numerous items, only five of which are involved in this action, none of which five exceeds 7% of the claim involved, and the total of which does not exceed 15% of the total claim.

5. That each of the parties was given a full and fair opportunity to present, and did in fact present, to such referees all the evidence, views, and arguments deemed relevant on all disputed points.

6. That not every disputed item was determined by the referees in favor of the insurers, the plaintiffs herein. While they decided against the assured on several of the disputed items in the proof of loss, which decisions the assured here claims vitiate the award, the referees at the same time decided in favor of the assured on several additional disputed items.

Bearing these considerations in mind, it is necessary to set forth the items which defendant claims were erroneously or inadequately decided by the referees, thereby vitiating the award. These claims are as follows:

I. That the referees, in determining the profit from the box factory operations, carried on during the loss period for the purpose of reducing the loss to the extent of such profit, as required by para-

graph 10 of the policies, costed the lumber used in such operations at O.P.A. ceiling prices, and that this was an error of law and of good accounting practice. (Defendant claims that this alleged error reduced the award to which it is entitled by \$73,000.00, but the evidence tends to show that the difference between the figure claimed by defendant and that reached by the referees was approximately \$49,000.00, after adjustment for expense items not claimed by defendant);

II. That the referees compromised, at the sum of \$25,000.00, defendant's claimed losses (a) for excessive logging cost, (b) for log depreciation, and (c) for increased cost of yard and mill operations, including decking; and

III. That in fixing the "annual value," a necessary element in the computation of recoverable loss under the policy, the referees erred in including depreciation on the destroyed saw mill for the year following its destruction, thereby reducing the award to which the defendant was entitled by the sum of approximately \$8,000.00.

The basis for defendant's contention that these alleged mistakes of the referees invalidated the award is (a) that this was an appraisalment and not an arbitration, (b) that as appraisers the referees could not determine questions of law or construe the terms of the policy, and (c) that in the decisions on the disputed issues they erroneously determined questions of law, erroneously construed the terms of

the policy, acted outside the scope of the submission, and failed to pass upon matters included in the submission to them.

In discussing these three disputed items I do not believe it necessary to determine whether the reference was an appraisal or an arbitration. The policies under consideration covered the actual loss sustained by the insured by reason of the total or partial suspension of business caused by fire, consisting of the net profits of the business thereby prevented and fixed charges and expenses to the extent they would have been earned had no fire occurred. These policies provided in general that the loss should be reduced by profits earned during a total or partial resumption of business.

These policies were different from the usual fire policies which cover the value of property destroyed by fire. Under the latter type of policy, it is merely the duty of appraisers or arbitrators to determine that value, which is generally purely a question of fact. Under the policies in question, if a reference were required, the referees were of necessity to determine the profits made by the partial resumption of operations and the fixed charges and expenses; if questions of accountancy or of law were implicit in or incidental to such determination it was the clear intent of the provisions for reference in said policies that the referees should make such determinations, whether they were appraisers or arbitrators.

I.

Costing Lumber Used in Box Factory Operations
at O.P.A. Ceiling Prices

At the time of the fire defendant owned and operated a large lumber manufacturing plant consisting of a saw mill, planing mill, dry kilns, box factory and similar structures, and owned and operated extensive forests in connection with said plant and for the supply of logs thereto. The operations consisted of felling the trees, bringing the logs to the mill, and putting them through the saw mill, thereby producing different grades of lumber, some of which were sold, some of which were run through the box factory, and some of which were put through other processes. At the time of the fire there were on hand at the mill site milled lumber and logs. There were also felled logs in the forests. After the fire the defendant continued to fell logs, bring them in from the forest, and put them in the mill pond. When the pond was filled, any additional logs were decked. Some of the milled lumber on hand was damaged by the fire. Some of the remainder on hand was apparently processed through the box factory, and some was apparently sold as lumber. The lumber processed through the box factory consisted of 8,828,644 board feet. The source of this lumber was 11,814,000 board feet produced from the latest operations of the saw mill immediately preceding the fire and 3,619,000 board feet taken from the inventory existing on March 31, 1945. In determining

the cost of this lumber that was put through the box factory operations, the defendant computed a cost of \$39.86 per M, which it describes as average or true cost; in general this was computed by taking all of the lumber from which this 8,828,644 board feet were taken and dividing it by the cost of production including administration and overhead costs allocated to its production, thereby obtaining the average cost, regardless of grade, of \$39.86 per thousand board feet. The defendant contends that its entire operation was an integrated whole, and since no profit would be realized until the box shook produced by the box factory was sold, which was done, this was the only method of costing the lumber into the box factory to determine the profit realized by its operations.

The insurers contend and the referees agreed that such average cost was an improper method of costing the lumber into the box factory and did not conform to general theory and practice of accountancy. The referees agreed that the lumber should be costed into the box factory at O.P.A. ceiling prices including an adjustment for freight differential favorable to defendant, or else on what is designated as an allocated cost basis which would distribute the common costs of production among the various grades produced, in proportion to the respective market value of each grade at the point of diversion to supplemental processes.

The referees costed the lumber into the box factory at O.P.A. ceiling prices adjusted for said

freight differential. It is generally conceded that this was more favorable to the defendant than an allocated cost, if that could be determined. The defendant contends that this was an error of law and thereby rendered the award invalid.

Defendant asserts that the referees thought they must accept O.P.A. ceiling prices. There are some statements to this effect in the depositions, but taking all the evidence into account, it is clear that this thought, if in the minds of any or all of the referees, was not the motivating or actuating basis for their decision. They decided as a matter of practical and realistic accounting that the O.P.A. ceiling price was the fairest, most practical and realistic method of costing the lumber into the box factory for the purpose of determining the profit from the box factory operations.

The reasons for this action by the referees are well stated in plaintiff's exhibit "S," a letter dated March 1, 1948, from Anson Herrick to Paul Barnett, the attorney for the defendant. Herrick was the referee appointed by the defendant. This letter in part reads as follows:

"I believe your contention that the profit of the box factory after the fire should be based upon the average cost of all lumber produced is erroneous, without any foundation in accounting, and can be successful only by the application of some principle or claimed principles of law which will be wholly unrealistic and in disregard of accounting principles. . . .

“It should be obvious that an accurate profit and loss statement would not result if the beginning inventory had nothing but clears and the ending inventory had nothing but common or vice versa. Because of this the practice of cost allocation is well recognized in accounting. Under this method production cost is allocated between grades in the ratio of their value. This method has a sound basis in the principle that each piece of lumber produced should contribute to the cost of its production in ratio proportionate to its realizable value.

“Lumber, regardless of grade, constitutes a finished product and its reworking into doors or pipe or box shooks becomes a supplemental operation and it is fundamental that to determine the profit from such supplemental operation the lumber consumed should be charged in at a price equal to that which could have been realized had the supplemental operation not taken place. This is a general practice among lumber and box manufacturers, the Pickering Lumber Corporation determined a box factory profit upon that basis, and I doubt that you could get any accountant to testify to the effect that that was not the generally accepted basis. It was no surprise to me to be told by the other appraiser that he had consulted three or more accountants connected with lumber operations who informed him that such was the correct basis. . . .

“Another argument which may be made carries out the argument which you have used that in the case of Pickering Lumber Corporation there was what is termed an ‘Integrated operation’ and that

that lumber which was intended to be used for the production of box shook should not be considered a finished product. On such a basis the problem then becomes one of assigning to the various operations their contribution to the ultimate profit. In other words, while it is true from a legal standpoint that profit is not realized until the sale is consummated, it is unrealistic, viewing the three operations of logging, milling, and box factory as merely parts of one total operation, to contend that all of the profit from the sale of box shook belongs solely to the box factory. In fact, were it not for the fact that lumber is a finished product, the recognition of this principle of the contribution of each department to the total profit is necessary of recognition in many use and occupancy settlements. For the purpose of testing this theory I did make some preliminary computations the result of which developed a loss somewhat larger than that ultimately found, but because that computation was made before a number of other determinations which would bear upon it, it would be necessary for me to completely recompute it if you were to care to use it.

“The danger of the foregoing argument is the fact that profit is not construed to be realized until sale takes place and that consequently the production of each of the departments prior to the final department should be valued at cost which in this case would not be average cost for which you argue, but allocated cost and upon such basis the lumber used by the box factory in post fire operations would

be computed as costing at least several dollars less than the O.P.A. prices which were adopted.”

In the light of this reasoning it cannot be said that the course adopted by the referees was improper accounting procedure or an error in law.

This conclusion is fortified by the testimony of Rodolph, an expert accountant familiar with general accounting practice in the lumber industry and by the fact that in making a claim against the insurer of the property destroyed by fire, the defendant based its claim for the lumber destroyed on O.P.A. ceiling prices, though the average cost was available. In addition, to determine the profit from the box factory operation for management and income tax purposes, the defendant costed the lumber into the factory at O.P.A. ceiling prices.

The cases of *Studley Box etc. Co. v. Insurance Co.*, 154 Atl. 337, *Fidelity Phoenix etc. Co. v. Benedict Co.*, 64 F. (2d) 347, and *Armour & Co. v. Bowles*, 148 F. (2d) 529, relied upon by the defendant in support of its contention that the referees committed an error of law, do not support this contention, because they do not apply to the particular point under discussion. So far as I have been able to discover, neither party has cited any authority upon the exact question, to wit, is average cost, market value, or allocated cost the required or proper basis to use in the circumstances. The case of *National Union Fire Ins. Co. v. Anderson Pritchard Oil Corp.*, 141 F. (2d) 443, cited by the plaintiffs, appears closest in point and supports the conclusion of the referees.

For the foregoing reasons I conclude that the method adopted by the referees in determining the box factory profit did not invalidate the award.

II.

Allowance of \$25,000.00 to Cover Excess Logging Cost, Log Decking and Log Stain (Depreciation)

At the time of the fire defendant had felled; cut into logs and had on hand in decks 9,550,656 feet of logs. In the nine months following the fire it brought in from the forests to its millsite 11,301,877 feet of logs. Of these logs 5,456,937 feet had been cut before the fire and were lying on the ground, or in banks along side defendant's logging road, and 5,844,910 feet of them had been cut after the fire. This would indicate that at the end of said nine-months' period there was in excess of 20,000,000 feet of logs on hand for sawing operation when the sawmill was rebuilt, which was several months after the end of said nine months. For the protection of these logs during the interim defendant claims it was necessary to deck them.

Defendant claims that the excess logging cost of the 11,301,877 feet was \$3.60253 per M foot, or \$40,-715.40; that the cost of decking, expanding its spur tracks, and other abnormal expenses to retard depreciation of these logs was \$12,492.35, and that the stain and like depreciation was \$36,149.95; it claims that these items should be deducted from the gross recovery by partial logging operations to determine the net amount of fixed charges and continued ex-

penses recovered by the logging operations. Defendant contends that these items were definitely fixed and ascertainable and were not a matter of estimation or judgment and that each of these items should have been definitely found by the referees. The referees allowed a lump sum of \$25,000 to cover these three claimed items and another minor credit item of grazing rentals. Defendant claims that this allowance was a compromise and not a proper discharge of the submission to the referees and that they erroneously passed upon the legal question of whether these items were allowable expenses, thereby exceeding their powers because they had no jurisdiction to determine such a question.

The question of whether there was an "illegal" compromise seems to be a question of fact. There is nothing in the policies or in the reference paragraphs thereof which requires the appraisers to make specific findings respecting the adequacy or inadequacy of each of the many items in the proof of loss. The Supreme Court of California has recently held that the failure to make an express finding in the award on a particular claim does not invalidate the award.

"There is no general rule that arbitrators must find facts and give reasons for their award. In fact, the rule and general practice is to the contrary."

Sapp v. Barenfeld, L.A. 20682, Dec. 13, 1949
(reversing Sapp v. Barenfeld, 91 ACA 156,
cited and relied upon by defendant), and
cases cited therein.

The referees were required to decide upon the amount due the defendant under the policies, and the mere fact that they determined that \$25,000 was adequate to cover these three items would not be a failure to discharge the submission nor a case of exceeding the submission.

The contention of defendant that these items had been definitely ascertained and were not a subject of estimation or judgment is not supported by the evidence. The figure of \$3.6053 per M foot for excess logging cost was given by defendant's witness Momyer at the trial, but Herrick's notes of Momyer's testimony at the hearing before the referees show that Momyer conceded that the question of whether this figure of \$3.6053 was excessive was an open one. At the trial Momyer admitted that Herrick's notes in this respect were adequate. The referees found that this excessive logging cost was palpably excessive and Herrick characterized it as a guess and stated "There had been no adequate evidence with respect to this." Also, in Exhibit "V" it is said "a reasonable claim (for excess logging costs) probably would not have been more than \$15,000.00 to \$20,000.00." The situation was similar with regard to log stain and decking. Defendant's own witness Momyer conceded that the determination of log stain would of necessity be merely an estimate. Referee Maloney states that he was not satisfied with the estimate of \$36,149.95 made by defendant's experts for this item, that it was excessive, and that he did not accept it.

Apparently in determining these three items the referees also considered that labor and material costs generally had risen, that labor was more inefficient, and that these factors made the logging cost greater than in similar periods in the past, and would have occurred had there been no fire. Furthermore the appraisers seemed also to take into consideration the factor urged upon them by the insurers (Exhibit 4) that since there was approximately 15,000,000 feet more of logs on hand from these logging operations than normal production there was an accumulation of profit in such logs which was realized after the termination of the loss period.

There were many considerations which entered into the determination of the referees respecting these three items. This determination was reached by them after many lengthy conferences in which all of the considerations affecting the question were discussed. Herrick says in his letter to Barnett, Exhibit "R":

"As I told you this morning it is nearly impossible for me to recite all of the considerations during the very lengthy conferences which led to the determination (of the award) which as you know constituted a unanimous agreement."

Again in another letter to Barnett, Exhibit "S," Herrick says:

"As I have explained to you orally, in a situation such as this there is no specific amount which can be asserted to be the correct valuation and that all others are wrong but rather that there is an area

within which any amount is appropriate of designation as a fair valuation. The valuation found by the appraisers was in my opinion within that area.”

After viewing all of the evidence regarding the determination of these three items I cannot conclude that it was inadequate, or that it was a “compromise wearing the dress of an award.” I believe it was the result of a long, arduous and conscientious effort to arrive at a fair valuation in which all factors were considered. Thus I cannot find that it falls within the purview of *St. Paul Ins. Co. v. Eldracher*, 33 F. (2d) 675, or *Holker v. Parker*, 7 Cranch (U.S.) 436, or the other cases cited by defendant to the same effect as the two just cited. In arriving at this determination the referees may have deferred to the opinions of each other and thus reached a compromise of opinion, but such a concession and compromise is not the “illegal compromise” upon which the above cited *Eldracher* and *Parker* cases are based.

6 C.J.S. (Arbitration) Sec. 50;

Morse, *Arbitration of Award* 164-165.

As noted above, the case of *Sapp v. Barenfeld*, 91 ACA 156, relied upon by defendant, has been reversed by the Supreme Court of California. In any case, however, the facts and circumstances of the present case make inapplicable the ruling of the District Court of Appeal in the *Sapp* case. In that case the arbitrators did not consider or determine one of the issues submitted to them, and they failed to discharge the submission. It is con-

tended here that the appraisers did not consider or determine these three items, but the evidence is to the contrary. The testimony of Herrick, Maloney and Lilly show that they considered each of these items and that the allowance of \$25,000.00 included the excess logging cost, the log stain and the log decking. For instance, Maloney testified as follows:

“Q. Then you didn’t throw out excessive logging costs? A. No.

Q. Nor the log stain? A. No.

Q. Nor the log decking? A. No.”

(Dep. p. 17)

To the same effect see:

Herrick deposition p. 74;

Lilly deposition p. 8.

Accordingly it cannot be said that the appraisers failed to consider or determine these three items.

Defendant argues that Herrick considered the log stain deterioration and not depreciation, and therefore refused to consider it. But the testimony of Herrick and the documentary evidence taken as a whole show that Herrick did take the log stain into account and made allowance for it.

Herrick testifies in part as follows:

“Q. All right. . . . Now, did you consider that claim?

A. That entered into the allowance of \$25,000. . . . The excessive logging costs and the stain . . . and the decking.”

Herrick did not consider this log stain as depreciation as that term is used in Item II, and there-

fore did not include it in calculating total insurable values for the purpose of applying the contribution clause, and in this conclusion he was confirmed by the testimony of Momyer. But it is not true that Herrick did not consider this log stain, thinking it not covered by the policies. On the contrary his testimony (including that just quoted), and his letters show that he considered it and made allowance for it in said sum of \$25,000.00.

I cannot find that in this construction of the terms of the policies, or in any construction thereof made by them, Herrick and the other referees misconstrued the terms of the policies. Furthermore, as heretofore stated, the very nature of the questions to be submitted to the referees by the terms of the policies indicated that it was contemplated by and the intent of the parties that the referees should pass upon any subject that was implicit in or incidental to such determination, including questions of accountancy or law, whether they be called appraisers or arbitrators. Accordingly, if in determining these questions they were required to construe the policies or settle questions of law they were acting within the scope of the submission.

See: *Patriotic Order v. Insurance Co.*, 157 Atl. 259;

Continental Ins. v. Titcomb, 7 F. (2d) 833;
Chandos v. Insurance Co., 54 N. W. 390.

For the foregoing reasons I conclude that the allowance of \$25,000.00 for excessive logging cost, decking and log stain did not invalidate the award.

III.

Inclusion in Annual Insurable Values of
Depreciation on the Burned Sawmill

By the terms of paragraph 2(A) of the policy, in case of a suspension of operations caused by fire the insurer is liable for the "actual loss sustained by reason of such suspension, consisting of:

Item I: The net profits on the business which is thereby prevented;

Item II: Fixed charges and expenses only to the extent to which they would have been earned had no fire occurred, as follows: . . . depreciation . . . and such other fixed charges and expenses which must necessarily continue during a total or partial suspension of business."

Paragraph 4, the "Contribution Clause" reads as follows:

" . . . in the event of loss, this Company shall be liable for no greater proportion thereof than the amount hereby insured bears to seventy-five per cent (75%) of the total of the net profits (Item I) and charges and expenses (as specified in Item II) which would normally have been earned during the period of twelve (12) months immediately following the fire."

The combined total of the net profits and the charges and expenses "which would normally have been earned" during the year following the fire, is the so-called "annual value" or "insurable value"

which must be computed in order to apply the formula of the Contribution Clause.

The referees included in the "annual value" the sum of \$15,000, constituting depreciation on the sawmill, on the theory that such depreciation was a fixed charge which would normally have been earned. The defendant, on the other hand, contends that this amount should not have been added to the "annual value" because there could be no depreciation on a destroyed sawmill, and only such fixed charges that must necessarily continue during a suspension of business should be included in the said "annual value."

As can readily be shown by carrying out the computation required by the Contribution Clause, the effect of adding \$15,000 to the "annual value" is to reduce the amount of the recoverable loss; since the insurers are liable only for that proportion of the actual loss equivalent to the ratio between the amount of the insurance and the "annual" or "insurable" value, any addition to the denominator, which is the "annual value," reduces the proportion, and hence reduces the amount of the recoverable loss.

The disagreement between the parties stems basically from the difference in phraseology between paragraphs 2(A) and 4. Paragraph 2(A) enumerates the items that comprise the actual loss. These items include the net profits and fixed charges which must necessarily continue during the suspension of business. In determining the actual loss, the defendant and the referees correctly excluded the item of de-

preciation on the destroyed sawmill, since this was not an item that must necessarily continue after the fire.

Paragraph 4, on the other hand, is not concerned with determining the actual loss; the purpose of paragraph 4 is to provide the formula for determining the proportion of the actual loss for which the defendant-insurers will be liable. The basic item in this formula is the "annual" or "insurable" value, which is defined as "the net profits (Item I) and charges and expenses (as specified in Item II) which would normally have been earned during the year immediately following the fire."

The defendants maintain that the term "expenses which would normally have been earned" in paragraph 4 must be limited and restricted by the term "must necessarily continue" found in paragraph 2(A), for the reason that the word "expenses" in paragraph 4 is immediately followed by the parenthetical phrase "(as specified in Item II)." I do not believe the defendant is correct in this contention. The parenthetical phrase "(as specified in Item II)" appears to have been inserted in paragraph 4 merely for the purpose of including by reference the list of specific items listed in Item II of paragraph 2(A), so as to avoid the necessity of repeating this rather long list; it was not inserted therein for the purpose of also including by reference the concluding phrase of paragraph 2(A) "which must necessarily continue," so as to greatly restrict the meaning of the concluding phrase of paragraph 4 "which would normally have been earned."

This conclusion is buttressed by the fact that the purpose of the Contribution Clause is to compel the assured to carry full insurance to the values at risk. This purpose could not be achieved if the amount of insurable value would vary depending upon whether all or only a portion of the property actually burns, which would result from an adoption of the defendant's theory.

Therefore, it is the conclusion of this Court that the referees were correct in including depreciation on the burned sawmill in determining the "insurable value." The cases cited by defendant are not contrary to this conclusion, since they stand only for the proposition that depreciation on destroyed property cannot be claimed by the insured as an item of actual loss; these cases did not concern the determination of "insurable value."

In the light of the foregoing facts and conclusions of law it is the opinion of this Court that the award is valid and binding upon the parties thereto, and that the amount payable by each plaintiff to defendant is the amount heretofore tendered by each plaintiff as alleged in the complaint, and as shown in column (D) of Exhibit "C" attached thereto. Judgment will be prepared and entered in accordance with this opinion.

Dated: December 23rd, 1949.

/s/ HERBERT W. ERSKINE,
U. S. District Judge.

[Endorsed]: Filed December 23, 1949.

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 27th day of December, in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Herbert W. Erskine,
District Judge.

[Title of Cause.]

ORDER ENTERING JUDGMENT IN FAVOR
OF PLAINTIFFS, PLAINTIFFS TO HAVE
UNTIL JANUARY 6, 1950, TO PREPARE
AND LODGE FINDINGS OF FACT AND
JUDGMENT

This case having been heretofore tried and submitted, and due consideration had thereon, it is Ordered that judgment be entered herein for the plaintiffs and against the defendant, in accordance with a memorandum opinion heretofore signed and filed. Further ordered that plaintiffs may have until January 6, 1950, within which to prepare and lodge Findings of Fact and Judgment.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial commencing on 7 June 1949, on the issue of the validity of the appraisal award as raised by the complaint and the second amended answer and by the first count of the counterclaim contained in said second amended answer and the reply thereto, before the Court sitting without a jury, said issue not being triable of right by a jury and a jury trial as to said issue having been expressly waived; and the Court having heard and considered the testimony and the proofs offered by the respective parties and the arguments of counsel, and the cause having been submitted to the Court for decision; the Court, being fully advised in the premises, now makes the following findings of fact and conclusions of law.

Findings of Fact

I.

The jurisdiction of this Court arises out of the fact that the parties hereto are citizens of different states, and the amount in controversy is in excess of \$3000 exclusive of interest and costs; this is a suit brought pursuant to the Federal Declaratory Judgment Act (28 USC 400), and the case is one of actual controversy between plaintiffs and defendant; all as is more fully hereinafter found.

II.

Each of the plaintiffs is a corporation incorporated under the laws of a state of the United States other than the State of Delaware, or under the laws of a foreign country, as specifically set forth in paragraph II of the complaint herein to which reference is hereby made. Each of the plaintiffs is now and for many years past continuously has been engaged in business as an insurance underwriter in and by authority of the several states of the United States, including the State of California; the principal office of each of the plaintiffs in the State of California is located at San Francisco, California; and in the case of plaintiff Fireman's Fund Insurance Company, a California corporation, the principal office of said plaintiff is located at San Francisco, California.

III.

Defendant is a corporation incorporated under the laws of the State of Delaware. Defendant is now and for many years past continuously has been engaged in business in the State of California carrying on sawmill, box factory, and timber operations in said State of California. Defendant has, prior to the filing of the complaint herein, designated a resident of the State of California as agent for service of legal process, and several of its principal corporate and managing officers are and for some time have been residents of the State of California.

IV.

On or about 30 April 1945 each of the plaintiffs did, in California, issue and deliver to defendant its policy (or policies) of insurance known as use and occupancy or business interruption insurance, insuring defendant against actual loss sustained by reason of suspension of business resulting from damage by fire to certain properties of defendant located in the State of California, for a term of one year from and after 30 April 1945, and on the provisions of and subject to the terms and conditions contained in said policies of insurance. A copy of the policy of insurance so issued by plaintiff The Home Insurance Company is attached hereto, marked Exhibit "A" and Exhibit "B," and made a part hereof; each of the policies issued by plaintiffs is substantially identical in form and substance to the said policy issued by plaintiff The Home Insurance Company. The identifying number of and the amount of insurance provided for (as of 7 July 1945) in each of the policies so issued by plaintiffs is as shown in the first three columns of Exhibit "C" attached hereto and made a part hereof, the amount of insurance so provided being as shown in Column (A) of said Exhibit "C." The total amount of insurance provided for (as of 7 July 1945) in and by all of said policies in the aggregate is the sum of \$651,000. At the time of the fire hereinafter referred to, defendant carried no use and occupancy or business interruption insurance other than or in addition to the said policies issued by plaintiffs.

V.

On 7 July 1945 a fire damaged the properties referred to in said policies, and caused a suspension of business by and a loss to defendant.

VI.

On or about 22 March 1946 at the request of defendant, plaintiffs and each of them made an advance payment to defendant on account of said fire and loss pending ascertainment of the amount of said loss. Said advance payment was in the aggregate amount of \$250,000, and the amount paid by each plaintiff to defendant is as shown in Column (C) of Exhibit "C" attached hereto.

VII.

From time to time following said fire, at the request of defendant, plaintiffs extended the time for filing proofs of loss under said policies of insurance; within the time as so extended and on or about 24 January 1947 defendant made and delivered to plaintiffs its proof of loss in the form of a document entitled "Final Proof of Loss" directed to each and all of plaintiffs. In said document defendant made claim against plaintiffs for an alleged loss in the total amount of \$742,004.41; and defendant therein demanded payment from each plaintiff of an amount equal to the face amount of its respective policy (or policies) as shown in Column (A) of Exhibit "C," plus interest, less the amount of the advance payment made to defendant

by each plaintiff as found in paragraph VI hereinabove and as shown in Column (C) of Exhibit "C." The amount so demanded by defendant from each plaintiff, even after deduction of the advance payment made by each, and exclusive of interest and costs, was and is in excess of the sum of \$3000 as to each plaintiff.

VIII.

On or about 27 January 1947 and within the time provided by said policies of insurance plaintiffs notified defendant in writing that the said proof of loss was defective in the particulars specified in the notice and requested that the defects be remedied by verified amendments. On or about 6 February 1947 defendant made and delivered to plaintiffs its reply to said notice in the form of a document entitled "Reply Affidavit."

IX.

On or about 10 February 1947 and within the time provided by said policies of insurance, plaintiffs notified defendant in writing of their total disagreement with the amount of loss claimed by defendant and of the amount of loss plaintiffs admitted, all in accordance with the provisions of said policies of insurance.

X.

Plaintiffs and defendant failed to agree within 10 days after said notice of disagreement, as to the value of the subject of insurance and the amount

of loss. On or about 21 February 1947 and within the time provided by said policies of insurance plaintiffs demanded in writing an appraisement and named a competent and disinterested appraiser. Defendant thereupon appointed a competent and disinterested appraiser. The two appraisers so chosen, before commencing the appraisement, selected a competent and disinterested umpire.

XI.

Thereafter the appraisers and umpire entered upon said appraisement pursuant to the provisions of said policies of insurance. On or about 18 April 1947 the referees requested plaintiffs and defendant to extend until 3 May 1947 the time for completion of the appraisement, and plaintiffs and defendant consented in writing to such extension of time. By written award dated 1 May 1947 duly signed and verified by the two appraisers and by the umpire the values and loss were estimated, ascertained, and appraised, and the sound value and damage were separately stated, all in accordance with the provisions of the said policies of insurance, as follows:

(1) The net profits prevented and fixed charges and continuing expenses during the period from 8 July 1945 to 7 April 1946, reduced by profits realized and fixed charges and continuing expenses recovered by partial operation following the fire, were fixed at the amount of \$581,000;

(2) The net profits prevented and charges and expenses which would normally have been earned

during the period of 12 months immediately following the fire were fixed at the amount of \$1,030,000;

(3) The expenses incurred by defendant, other than those constituting costs of partial operations, for the purpose of reducing the loss, were fixed at the amount of \$1,760.

XII.

By application of the provisions of said policies to the said ascertainment by appraisal award, the aggregate amount payable to defendant by plaintiffs pursuant to the provisions of said policies was and is the sum of \$491,379.41; and the amount payable by each plaintiff under and by virtue of said ascertainment and said provisions is that proportion of \$491,379.41 which the face amount of each of said policies bears to the aggregate face amount of all of said policies, as shown in Column (B) of Exhibit "C."

XIII.

Between on or about 26 and 28 May 1947 and within the time provided by said policies a number of the plaintiffs tendered to defendant the full amounts payable by each of them respectively under said award as shown in Column (B) of Exhibit "C," less the amount of the advance payment theretofore made by each such plaintiff, the amount so tendered by each such plaintiff being as shown in Column (D) of Exhibit "C." Thereafter and between on or about 29 and 31 May 1947 defendant

rejected, refused, and returned each and every such tender made by plaintiffs as aforesaid; and at the same time defendant advised all plaintiffs, including those who had not yet made any tender, that defendant would not accept payment from any of plaintiffs under said award, that defendant intended to dispute the validity of said award and would not concede or accept its validity, and that defendant claimed to be entitled to receive from each plaintiff an amount equal to the face amount of its respective policy (or policies), and from all plaintiffs in the aggregate the sum of \$651,000, all as shown in Column (A) of Exhibit "C," plus interest, less the amount of the advance payments theretofore made by plaintiffs as found in paragraph VI hereinabove and as shown in Column (C) of Exhibit "C." Each of the plaintiffs was at all times from and after rendition of the said award ready, able, and willing to make payment to defendant under said award, and would have done so within the time provided by said policies of insurance had defendant not rejected the tenders made as aforesaid and had defendant not notified plaintiffs that it would reject all further tenders as aforesaid; any further tender made by or on behalf of any plaintiff under these circumstances would have been a vain and useless act and would have been rejected and returned by defendant.

XIV.

The amounts so tendered by some of the plaintiffs and the amounts that would have been tendered

by all the plaintiffs, as found in paragraph XIII hereinabove, were and are as shown in Column (D) of Exhibit "C," and were and are as to each plaintiff individually and as to all plaintiffs in the aggregate the full amounts to which defendant was and is entitled under and by virtue of the said policies of insurance. The said appraisal award, by virtue of which the said amounts were determined as aforesaid, was and is valid and binding on both plaintiffs and defendant.

XV.

At the time of the fire defendant owned and operated a large lumber manufacturing plant consisting of a sawmill, planing mill, dry kilns, box factory and similar structures, and owned and operated extensive forests in connection with said plant and for the supply of logs thereto. The operations consisted of felling the trees, bringing the logs to the mill, and putting them through the sawmill, thereby producing different grades of lumber, some of which were sold, some of which were run through the box factory, and some of which were put through other processes.

XVI.

The fire destroyed the sawmill and thereby caused a complete suspension of business by defendant for a few days and a complete suspension of the operation of the sawmill for more than one year. At the time of the fire defendant had on hand a large amount of lumber which it had procured by run-

ning its logs through its sawmill and which lumber was suitable for being used in said box factory for the manufacture of box shook. Defendant cut additional logs after the fire and hauled these, as well as the logs already cut prior to the fire, to the plant site; there the logs were decked; the decking occasioned expense to defendant and did arrest deterioration, decay, check, and depreciation of the logs. Defendant resumed partial operation by operating its box factory until it had used all the supply of lumber suitable for the manufacture of box shook.

XVII.

In all respects the referees acted pursuant to and in accordance with the provisions of said policies of insurance. It was the clear intent of said policies and it was contemplated by and was the intent of plaintiffs and defendant that the referees should pass upon and determine any subject that was implicit in or incidental to the determination of the questions submitted to the referees, including questions of accountancy or law, and to do so with finality. The referees decided no question or subject that they were not empowered to decide or that they were not required to decide in order to arrive at an award under the said policies; at no time and on no subject did the referees act otherwise than within the scope of the submission. The referees were not required to, nor was it the intent of the policies or the parties that referees should, make specific or express findings respecting the adequacy

or inadequacy of each of the many items that made up defendant's claim. None of the five items as to which defendant contends that the referees erred exceeds 7% of the total claim, and all five together do not exceed 15% of it. The referees did not determine all of the disputed items in favor of plaintiffs; some were decided in favor of defendant and some in favor of plaintiffs.

All of the procedure followed and acts done by the referees in the course of the appraisal were consented to and acquiesced in by defendant as well as by plaintiffs. Hearings were held by the referees upon notice to all parties; plaintiffs and defendant alike were given a full and fair opportunity to present and each did in fact present to the referees all evidence, views, and arguments deemed by either to be relevant on all disputed points. No fact, point, or argument was presented at the trial of this cause by defendant that was not also presented to and urged upon the referees during the appraisal. Plaintiffs and defendant agreed that the referees need not confine themselves to information received at the hearings, but might inform themselves in any legitimate manner and from any legitimate source they saw fit; this the referees did, and they were not guilty of impropriety or misconduct in so doing.

The award was the unanimous decision of both appraisers and of the umpire; the appraiser appointed by defendant not only joined in it but advocated it. The decision and award is correct

and valid. The appraisers and umpire, singly and collectively, were guilty of no fraud, either actual or constructive, nor of misconduct, bias, or partiality; they attempted to be and were in fact fair and equitable in the performance of their duties as referees and at all times attempted to do full justice between the parties; they were well qualified and competent to undertake the appraisal.

XVIII.

Said award is valid and binding upon both plaintiffs and defendant. It is not true that the referees mistook or exceeded their authority, or misconceived their duties; nor did they commit or act upon fundamental or gross or any errors, either of law or of fact, nor make their calculations upon unlawful or erroneous bases; nor did they wholly or partially omit to consider or allow for any item of loss which was suffered by defendant and covered or insured by each or all or any of said policies. It is true that the referees undertook to construe certain provisions of said policies; in each instance where they did so, however, it was necessary that they do so in order to arrive at an award, and such construction of the policies by the referees was implicit in and incidental to the determination of the questions submitted to them for decision and award; it was the clear intent of said policies and it was contemplated by and was the intent of plaintiffs and defendant that the referees should pass upon and determine with finality any question of the con-

struction of the policies implicit in or incidental to the making of an award; the referees did not act otherwise than within the scope of the submission in so construing the policies. It is not true that the referees misconstrued the policies; in each instance where the referees undertook to construe the policies, they construed the policies correctly and in accordance with the intent of the parties and the language used.

XIX.

Pursuant to the provisions of the said policies the referees undertook to and did fix and ascertain the amount of profit made and realized by defendant by the partial operation of its plant and business during the nine-month period immediately following the fire, and deducted the amount so found from the net profits prevented and fixed charges and continuing expenses found by said referees. It is not true that in making said calculation the referees acted wrongfully, erroneously, contrary to any provision of said policies, or contrary to law, or that they arbitrarily or at all separated the partial operation of defendant's plant and business succeeding the fire or treated the same as two separate, distinct, or unrelated partial operations; nor did they treat the operation of the box factory as separate and distinct from the logging operation, nor fix the amount of profit resulting from the operation of the box factory considered as a separate and distinct operation and business.

It is true that defendant as part and parcel of

the partial operation after the fire engaged in logging, and that the logs cut and on hand could not be promptly sawed into lumber, and that some depreciation occurred in said logs because of rot, stain, check, and brashness. It is not true that the amount of depreciation which occurred in said logs within the nine-month period immediately following the fire was more than \$36,000, or was more than the amount allowed therefor by the referees, as is more fully found hereinafter. It is not true that the referees did not question the amount of such depreciation; they considered the amount claimed therefor to be excessive and determined that the amount thereof was a different and substantially lesser sum than that claimed by defendant. It is not true that the referees wrongfully, erroneously, mistakenly, or contrary to law, or otherwise or at all, failed to allow for the amount of such depreciation, or failed to treat it as a part of the expense of partial operation after the fire; or that they wrongfully, erroneously, or mistakenly, or at all, failed to treat the said loss of worth in said logs as covered by said policies. It is not true that in this or any other connection the referees misconstrued their authority or duty, or that they committed grave, gross, fundamental, or any errors of either law or fact. It is true that the appraiser appointed by defendant did not consider this item to be depreciation as that term is used in Item II of the said policies, and in reaching this conclusion

said appraiser correctly construed the said policies. It is not true that this appraiser or the referees did not consider this item of depreciation, or treated it as not covered by said policies. The referees did consider this item of depreciation in the logs and did make an allowance therefor in a fair and reasonable amount, as is more fully found hereinafter.

XX.

One of the effects of the fire was to cripple and reduce the efficiency of defendant's plant, and as a result it was more expensive for defendant to continue partial operation after the fire. Defendant claimed that the additional expenses for logging amounted to more than \$42,000. It is not true that the said claimed additional expenses were not estimated but were actually incurred and the actual amount thereof correctly entered upon defendant's books; nor is it true that the correctness of defendant's books in this connection was not disputed or questioned by the referees, or that they made no finding that said excessive logging cost was in any different or smaller amount; nor is it true that the referees failed to make any allowance on account of said claimed excessive cost of logging. The referees did consider this item of claimed additional expenses and determined that the amount thereof was a different and substantially lesser sum than that claimed by defendant, and the referees found and determined that the amount claimed for this item was palpably excessive and was merely a guess

or estimate by defendant; the referees did make an allowance for this item in a fair and reasonable amount, as is more fully found hereinafter. It is not true that in this or any other connection the referees misconceived their powers or duties, or that they committed a gross or any error of either law or fact.

XXI.

Defendant claimed that it was put to extra expense in its mill and yard operation because of the crippled and inefficient condition of its plant after the fire in the sum of more than \$15,500. It is not true that all of this claimed extra expense was actually incurred and correctly entered upon defendant's books; nor is it true that the correctness of defendant's books in this connection was not disputed or questioned by the referees, or that they made no finding that said extra expense was in any different or lesser amount; nor is it true that the referees failed to make any allowance on account of said claimed extra expense. The referees did consider this item of claimed extra expense and determined that the amount thereof was a different and substantially lesser sum than that claimed by defendant; the referees did make an allowance for this item in a fair and reasonable amount, as is more fully found hereinafter. It is not true that the referees failed to treat the said item of extra expense as covered by the said policies. It is not true that in this or any other connection the referees

acted wrongfully, or committed a gross or any error, or failed to make a proper allowance therefor.

XXII.

It is not true that the referees committed any error in connection with any of the items of claim referred to in these findings or in connection with any other item of defendant's claim; nor is it true that the referees committed any error in the calculations or findings made by them concerning actual income or outgo after the fire, or in any other calculation or finding made by them. It is not true that the items of claim referred to in paragraphs XIX, XX, and XXI of these findings were not matters of estimation by defendant; nor is it true that all or any of them had to do with matters which actually occurred, the amounts of which had been definitely ascertained and correctly entered upon defendant's books. All and each of said items were mere matters of guess or estimation by defendant as to which the evidence before the referees was conflicting, and as to which the referees determined that the defendant's books and figures were inaccurate and insufficient to establish the amounts claimed. It is not true that the referees exceeded their authority in construing terms of the said policies, or otherwise exceeded their authority, either with respect to these items or any of them, or with respect to any other matter involved in the appraisal. In all respects the referees correctly construed the said policies. They were required to

construe said policies in order to determine the questions submitted for their decision, and this was contemplated by the terms of the policies and was the intent of the parties. In the determination of these questions and in the construction of the policies the referees acted at all times within the scope of the submission.

XXIII.

With respect to each and all of the matters or items of claim referred to in paragraphs XIX, XX, and XXI of these findings, it is not true that the referees failed to agree as to whether they should or should not be allowed as items of loss or damage to defendant, or that they disagreed as to whether the same were within the terms of the policies. The referees considered each and all of these matters and items, made determinations with respect thereto, and allowed the sum of \$25,000 on account thereof. It is not true that this amount was inadequate, or the result of a compromise agreement. It was the result of a long, arduous, and conscientious effort by the referees to arrive at a fair valuation, in which all factors were considered by them. It is not true that the said allowance of \$25,000 on account of these items did not represent the judgment or finding of the referees concerning the amount of said items, or was an amount on which the said referees agreed by compromise or as to which they made or entered into a compromise agreement. It is not true that in considering these items and determining that the allowance therefor should be in the amount

of \$25,000, the appraisers exceeded their authority or committed a gross or any error, or that in so doing they failed to consider or determine one or more of the issues submitted to them or failed to discharge the submission. It is not true that the referees held that to be a profit which was not a profit, or erroneously or otherwise treated the logging operation as no part of the partial operation after the fire, or construed the partial operation after the fire as two separate or distinct operations, or refused to treat expenses incident to logging or operation of the mill and yard after the fire as a part of the expense of partial operation after the fire, or wrongfully or otherwise construed the loss in worth of the logs after the fire as not being depreciation or continuing expense within the meaning of the policies or as not within the coverage of the policies or as not a reduction of the amount of profit realized by partial operation after the fire.

XXIV.

It is not true that the referees, in calculating the amount of profit made by the operation of the box factory after the fire acted wrongfully, erroneously, mistakenly, or contrary to law; nor is it true that they wrongfully, erroneously, or mistakenly construed Section 10 or any other provision of the said policies, or exceeded their authority, or committed grave, gross, fundamental, or any mistakes of either law or fact. Defendant computed the cost of the lumber put through the box factory opera-

tion at an average cost of all lumber produced by defendant, both that which was and that which was not used for the manufacture of box shooks, regardless of grade. The referees did not find that defendant had incorrectly computed such average cost, but they did find that such average cost was an improper method of costing the lumber into the box factory and did not conform to the general theory and practice of accountancy. The referees agreed and determined that the lumber should be costed into the box factory at OPA ceiling prices with an adjustment for freight differential favorable to defendant, and that in lieu of this method the lumber would have to be costed upon an allocated cost basis less favorable to defendant than the basis adopted by the referees. It is not true that the referees utilized OPA prices in this connection because they thought it was legally necessary for them to accept OPA ceiling prices; nor was this the motivating or actuating basis for their decision. The referees made this decision correctly, and as a matter of practical and realistic accounting, and as the fairest, most practical, and most realistic method of costing the lumber into the box factory for the purpose of determining the profit from the box factory operations. The use of average cost contended for by defendant would have been improper, erroneous, unrealistic and in disregard of accounting principles of cost allocation. The method adopted by the referees was based upon proper accounting procedure and was correct both in fact

and in law; it was in accordance with the general practices of the lumber industry and of the defendant itself. The method adopted by the referees was fair and reasonable, and resulted in a proper, adequate, and fair determination of the amount of profit made by defendant from the operation of the box factory after the fire. Determination by the referees of the method to be used in costing the lumber into the box factory was incidental to and implicit in and necessary for the computation of the profit made from the box factory operation; in making such determination the referees acted within the scope of the submission, and did not make any error either of fact or of law.

XXV.

It is not true that the phrase "charges and expenses" appearing in Section 4 of said policies (see Exhibit "B") refers only to fixed charges and expenses which must necessarily continue during a total or partial suspension of business. Said phrase refers to all charges and expenses which would occur during a normal year. It is true that the referees in arriving at the charges and expenses which would normally have been earned during the period of twelve months immediately following the fire included in said amount the sum of \$15,042 which was the amount the referees determined would have been the depreciation on the destroyed sawmill in the year following the date when the fire occurred had no fire occurred. It is true that

the referees allowed nothing by way of damage on account of any part of said depreciation on the sawmill as a fixed charge or continuing expense. It is true that the appraisers construed said Section 4 to require them to include said depreciation in said twelve month period, notwithstanding the fact that no depreciation whatsoever occurred upon said sawmill following the fire. It is not true that the appraisers thereby misconstrued the said policies, or exceeded their authority or committed a gross or any error of law or of fact. The referees were correct in including the item of depreciation on the burned sawmill in determining the insurable values for the purposes of said Section 4.

XXVI.

It is not true that the referees made or that the award contains fundamental, gross, palpable, or any errors of law or of fact; nor is it true that the referees exceeded their authority in construing terms of the said policies, or exceeded the submission; nor is it true that the referees misconstrued the said policies; nor is it true that the referees entered into a compromise agreement. It is not true that the award does not allow for all proper items of loss. The award is fair and adequate and does allow for all proper items of loss in a fair, adequate, and reasonable amount. It is not true that the said award is invalid or void.

Conclusions of Law

I.

The said appraisal award is valid and binding upon the parties hereto.

II.

The amount payable by each plaintiff to defendant is as shown in Column (D) of Exhibit "C" attached hereto, without interest.

III.

Defendant is entitled to take nothing by reason of its second amended answer and counterclaim herein, including both counts of said counterclaim.

IV.

Plaintiffs are entitled to judgment against defendant as prayed in the first paragraph of the prayer of their complaint herein, and for their costs of suit herein incurred.

Let judgment be entered accordingly.

Dated: San Francisco, January 16, 1950.

/s/ HUBERT W. ERSKINE,
District Judge.

[Exhibits A, B and C referred to above are identical to Exhibits A, B and C, attached to Complaint set out at pages 16 to 48.]

Lodged January 6, 1950.

[Endorsed]: Filed January 16, 1950.

In the District Court of the United States for the
Northern District of California, Southern Division

No. 27299 E

THE AMERICAN INSURANCE COMPANY,
et al.,

Plaintiffs,

vs.

PICKERING LUMBER CORPORATION, a cor-
poration,

Defendant.

JUDGMENT ON FINDINGS

This cause having come on regularly for trial commencing on 7 June 1949, on the issue of the validity of the appraisal award as raised by the complaint and the second amended answer and by the first count of the counterclaim contained in said second amended answer and the reply thereto, before the Court sitting without a jury, said issue not being triable of right by a jury and a jury trial as to said issue having been expressly waived; Messrs. Bert W. Levit and Long & Levit appearing as attorneys for plaintiffs, and Messrs. Harold C. Brown and Watson, Ess, Whittaker, Marshall & Enggas appearing as attorneys for defendant; and oral and documentary evidence on behalf of the respective parties having been introduced and closed, and the cause having been submitted to the Court for consideration and decision; and the Court, after due

deliberation, having rendered its decision and filed its findings of fact and conclusions of law;

Now, Therefore, by virtue of the law and by reason of the findings and conclusions aforesaid, It Is Ordered, Adjudged, Decreed, Determined, and Declared as follows:

1. That the appraisal award dated 1 May 1947, rendered under and pursuant to the provisions of certain policies of fire insurance issued by plaintiffs, respectively, to defendant on or about 30 April 1945, is valid and binding upon plaintiffs and defendant;

2. That defendant is entitled to take nothing by reason of its second amended answer and counter-claim herein, including both counts of said counter-claim;

3. That plaintiffs, severally and respectively, pay to defendant the sums hereinafter set forth:

Plaintiff	Amount
The American Insurance Company.....	\$ 1,853.92
Atlas Assurance Company Limited.....	7,415.65
Caledonian Insurance Company.....	14,367.82
The Camden Fire Insurance Association.	6,488.69
Columbia Insurance Company of New York	2,966.26
Commercial Union Assurance Company, Limited	9,269.57
The Continental Insurance Company....	9,269.57
Fire Association of Philadelphia.....	3,707.82

Fireman's Fund Insurance Company....	6,303.30
Firemen's Insurance Company of New- ark, New Jersey	5,561.74
Glens Falls Insurance Company.....	14,831.30
Globe and Rutgers Fire Insurance Com- pany	1,853.92
Great American Insurance Company....	7,508.34
The Hanover Fire Insurance Company..	3,707.82
Hartford Fire Insurance Company.....	3,707.82
The Home Insurance Company.....	5,561.74
Insurance Company of North America...	2,780.87
Insurance Company of North America...	5,561.74
National Fire Insurance Company of Hartford	12,096.78
National Liberty Insurance Company of America	6,229.15
National Union Fire Insurance Company of Pittsburgh, Pa.....	5,561.74
New Hampshire Fire Insurance Com- pany	11,123.47
New York Underwriters Insurance Com- pany	7,415.65
New Zealand Insurance Company, Limited	9,269.57
The Northern Assurance Company Limited	11,911.39
Norwich Union Fire Insurance Society Limited	4,634.78
Pearl Assurance Company, Limited.....	3,707.82
The Pennsylvania Fire Insurance Com- pany	5,561.74

Queen Insurance Company of America..	12,143.12
St. Paul Fire & Marine Insurance Com- pany	1,853.91
Scottish Union and National Insurance Company	1,853.91
Security Insurance Company, of New Haven	9,269.57
Springfield Fire and Marine Insurance Company	3,707.82
The Travelers Fire Insurance Company..	6,488.69
United States Fire Insurance Company..	7,489.80
Westchester Fire Insurance Company...	5,561.74
The Western Assurance Company.....	2,780.87

4. That plaintiffs recover their costs of suit herein incurred, taxed at \$.....

Done in Open Court, January 16, 1950.

/s/ HUBERT W. ERSKINE,
District Judge.

Dated January 12, 1950.

Approved as to form.

/s/ HAROLD C. BROWN.

Entered in Civil Docket Jan. 16, 1950.

Lodged January 6, 1950.

[Endorsed]: Filed January 16, 1950.

In the District Court of the United States for the
Northern District of California, Southern Division.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Pickering Lumber Corporation, a corporation, the defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on January 16, 1950.

/s/ HAROLD C. BROWN,

/s/ HENRY N. ESS,

/s/ CHARLES E. WHITTAKER,

Attorneys for Appellant Pickering Lumber Corporation.

Receipt of copy acknowledged.

[Endorsed]: Filed January 30, 1950.

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men By These Presents, That Pickering Lumber Corporation, a Delaware corporation, having an office and place of business in the City of Standard, County of Tuolumne and State of California, as Principal, and Pacific Indemnity Company, an insurance corporation authorized to do and transact business in the State of California, as Surety, are held and firmly bound unto the plaintiffs, appellees, in the above-captioned cause in the sum of Two Hundred Fifty Dollars (\$250.00), for the payment to them of which, well and truly to be made, we hereby bind ourselves, our successors and assigns, firmly by these presents:

Whereas, on the 16th day of January, 1950, a judgment was entered in the above entitled proceeding;

And the appellant, Pickering Lumber Corporation, feeling aggrieved thereby, appeals to the United States Court of Appeals for the Ninth Circuit.

Now, Therefore, the condition of this obligation is such, that if the aforesaid judgment is affirmed or modified by the appellate court, or if the appeal is dismissed, and the appellant, Pickering Lumber Corporation, shall pay all costs which may be awarded against it on said appeal, then this Bond

shall cease and terminate, otherwise to be and remain in full force and effect.

In Witness Whereof, this Bond is executed, this 30th day of January, 1950.

PICKERING LUMBER CORPORATION, a Corporation,

/s/ By B. JOHNSON,
Chairman of the Board.
Principal.

PACIFIC INDEMNITY
COMPANY,

[Seal] By /s/ B. T. KENNEY,
Its Attorney-in-Fact.
Surety.

[Endorsed]: Filed January 30, 1950.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

To the Clerk of the Above Court:

Pickering Lumber Corporation, the defendant, and now appellant, in the above cause, hereby designates the following as those portions of the record, proceedings and evidence to be contained in the record on appeal of this cause to the United States Court of Appeals for the Ninth Circuit;

1. Plaintiffs' "Complaint for Declaratory Relief," omitting exhibits "A," "B" and "C" attached thereto (because they were admitted in evidence as plaintiffs' exhibits "A," "B" and "C").

2. Defendant's "Second Amended Answer and Counterclaim."

3. Plaintiffs' "Reply to Counterclaim (in Second Amended Answer)."

4. Plaintiffs' "Amendment to Reply to Counterclaim (in Second Amended Answer)."

5. The Complete Reporter's transcript of the evidence taken at the trial of this cause, omitting the closing arguments of counsel.

6. The Deposition of Anson Herrick.

7. The Deposition of Frank Maloney.

8. The Deposition of Lewis Lilly.

9. All exhibits offered and admitted in evidence at the trial of this cause, consisting of:

(1) Plaintiffs' exhibit "A,"—printed Policy of Insurance.

(2) Plaintiffs' exhibit "B,"—mimeographed attachment or endorsement to printed Policy of Insurance.

(3) Plaintiffs' exhibit "C,"—columnar tabulation showing numbers, names of issuing companies, amounts of policies, etc.

(4) Plaintiffs' exhibit "D,"—the Proof of Loss.

(5) Plaintiffs' exhibit "E,"—the Reply Affidavit.

(6) Plaintiffs' exhibit "F,"—the "Award and other findings of the appraisers."

(7) Plaintiffs' exhibit "G,"—letter of Paul Barnett to K. W. Withers, of May 26, 1947.

(8) Plaintiffs' exhibit "H,"—letter of Cosgrove & Company to Firemens Fund Insurance Company, of May 29, 1947.

(9) Defendant's exhibit "1,"—the Moffett report of log depreciation.

(10) Defendant's exhibit "2,"—the Thomas report of log depreciation.

(11) Defendant's exhibit "3,"—"Memorandum to Appraisers" by K. W. Withers and W. N. Ball.

(12) Plaintiffs' exhibit "I,"—letter of Momyer to Fire Companies Adjustment Bureau, of October 10, 1945, and attached sheets.

(13) Plaintiffs' exhibit "J,"—letter of Momyer to Fire Companies Adjustment Bureau, of October 11, 1945, and attached sheets.

(14) Plaintiffs' exhibit "K,"—letter of Momyer to Withers, of July 1, 1946.

(15) Plaintiffs' exhibit "L,"—letter of Robinson Nowell & Company to Withers, of August 14, 1946.

(16) Plaintiffs' exhibit "M,"—Audit Report.

(17) Plaintiffs' exhibit "N,"—letter by Momyer and Johnson to Mr. Frank Maloney and Mr. Anson Herrick, of February 28, 1947.

(18) Plaintiffs' exhibit "O,"—letter of Mr. Frank Maloney to Pickering Lumber Corporation, of March 4, 1947.

(19) Plaintiffs' exhibit "P,"—letter of Mr. Anson Herrick to Pickering Lumber Corporation, of March 21, 1947.

(20) Plaintiffs' exhibit "Q,"—letter of Mr. Anson Herrick to Insurance Companies, of March 21, 1947.

(21) Defendant's exhibit "4,"—letter of Withers to Maloney and Herrick, of April 4, 1947 (Exhibit 1 in Deposition of Anson Herrick).

(22) Defendant's exhibit "5,"—the Baker report (Exhibit 3 in Deposition of Anson Herrick).

(23) Defendant's exhibit "6,"—brief filed with Appraisers by Pickering (Exhibit 4 in Deposition of Anson Herrick).

(24) Defendant's exhibit "7,"—a computation (Exhibit 7 in Deposition of Anson Herrick).

(25) Plaintiffs' exhibit "R,"—letter from Herrick to Barnett, of May 14, 1947 (Exhibit "A" in Deposition of Anson Herrick).

(26) Plaintiffs' exhibit "S,"—letter from Her-

rick to Barnett, of March 1, 1948 (Exhibit "B" in Deposition of Anson Herrick).

(27) Plaintiffs' exhibit "T,"—"Notes relating to hearing of the matter by the Appraisers," being page 115 and following of the Deposition of Anson Herrick.

(28) Plaintiffs' exhibit "U,"—"Draft Memorandum of procedures" (Exhibit "D" attached to Deposition of Anson Herrick).

(29) Plaintiffs' exhibit "V,"—Memorandum of Anson Herrick, of May 2, 1947 (Exhibit "E" attached to Deposition of Anson Herrick).

(30) Plaintiffs' exhibit "W,"—Summary of differences by Anson Herrick (Exhibit "F" attached to Deposition of Anson Herrick).

10. Defendant's Requested Findings of Fact and Conclusions of Law, filed with the court at the conclusion of the evidence, on June 10, 1949.

11. The Opinion of the court, filed December 23, 1949.

12. The Journal Entry made by the clerk, giving plaintiffs until January 6, 1950, to prepare and lodge findings and judgment.

13. The Findings of Fact and Conclusions of Law adopted and entered by the court, together with the direction for the entry of judgment thereon.

14. The Judgment, entered January 16, 1950.
15. Notice of Appeal, with date of filing.
16. Bond on Appeal, with date of filing.
17. This Designation of Contents of Record on Appeal.

/s/ HAROLD C. BROWN,

/s/ HENRY N. ESS,

/s/ CHARLES E. WHITTAKER,

Attorneys for Defendant-
Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed January 30, 1950.

In the District Court of the United States for
the Northern District of California, Southern
Division

No. 27299-E

AMERICAN INSURANCE COMPANY, et al.,
Plaintiffs,

vs.

PICKERING LUMBER COMPANY,
Defendant.

Before: Hon. Herbert W. Erskine,
Judge.

Appearances:

BERT LEVIT, ESQ.,
For the Plaintiff.

CHARLES E. WHITTAKER, ESQ.,
HAROLD C. BROWN, ESQ.,
For the Defendant.

REPORTER'S TRANSCRIPT

Tuesday, June 7, 1949

The Clerk: American Insurance Company ver-
sus Pickering Lumber Company.

Mr. Levitt: Ready for the plaintiff.

Mr. Whitacker: Ready for the defendant.

Mr. Levitt: May it please the Court, the plain-
tiff's case will be very brief, and if agreeable I will
present it by merely reviewing the allegations of
the Complaint, most of which are admitted. There

will be one or two documents I will introduce into evidence, I think without the necessity of any identification, as I go along.

I would prefer to reserve any Opening Statement that may be necessary until just a little later, except to say at this time, as I said at the pre-trial, that the suit is in the form of a Declaratory Judgment Suit, brought by the Insurance Company to sustain the validity of the award and establish their liability to the defendant, who has refused to accept the amount of the award.

Counsel and I have entered into an informal understanding to the effect that notice to the produced documents will not be required on either side. I assume that will go to the point that in the normal course of events, objections will not be taken to the documents, merely because of copies rather than the original.

Mr. Whitacker: That is correct.

Mr. Levitt: The first paragraph of the Complaint is to the jurisdictional facts, which are admitted.

The second paragraph sets forth, states the incorporation of each of the plaintiffs and alleges that each of the plaintiffs are engaged in the business of insurance in the United States, with principal offices located in San Francisco, and that is admitted.

Paragraph three alleges the defendant is a corporation engaged in business in California, with residing officers here; that is admitted.

Paragraph four alleges——

Mr. Whitacker (Interrupting): Pardon me, Mr. Levitt, you say that is admitted—that is, the Answer is admitted?

Mr. Levitt: Yes, referring to the allegations of the Answer.

Paragraph four alleges the issuance of the policies of insurance that are involved in this action by the various plaintiffs. Exhibit A and B, attached to the Complaint, show the terms of the policies, and allege all policies were identical in form *an* substance to those Exhibits. We now, at this time, would like to offer in evidence, as Plaintiff's Exhibit A, the Exhibit A attached to the Complaint, and Plaintiff's Exhibit B, the balance of the policy form, which is attached to the Complaint.

Mr. Whitacker: There is no objection, your Honor.

The Court: So ordered, Exhibit A is admitted, and [2*] Exhibit B is admitted in evidence.

Mr. Levitt: I may pause for just a moment, your Honor, to say that the policies, as Exhibit A will show, are in the California standard statutory form, and Exhibit A is merely one of those policies, typed out as an example, with the accepted difference in that amount attached to that form was a special endorsement relating to the particular coverage granted in this case. That is embodied in Exhibit B, all the policies with the same consistency, both Exhibit A and B appear. The Complaint

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

then lists each policy by number and company and the amount—and the total amount of insurance is stated. It also alleges that this was all the business interruption insurance by the plaintiff; this allegation is admitted by the Answer.

Paragraph five of the Complaint alleges that on July 7, 1945, a fire occurred and damage to the property referred to in the policy, and causing a loss, which is admitted.

Paragraph six alleges that there was an advance payment made by the insurer at the request of the defendant on the 22nd of March, 1946, of \$250,000.00, and the amount paid by each plaintiff was shown in column C of Exhibit C. We now offer in evidence Exhibit C, attached to the Complaint.

Mr. Whitacker: There is no objection.

The Court: Plaintiff's Exhibit C in evidence.

Mr. Levitt: This Exhibit C, your Honor, is merely a [3] tabulation, showing each policy number, the name of the Company issuing it, and the amount of the policy, in Column A. In Column B, the amount of the appraisal award apportioned to each policy. Column C, the amount of the advance payment apportioned to each policy, and Column D the amount tendered by each plaintiff, or at least alleged to be tendered by each policy.

Paragraph seven alleges that the time for filing Proof of Loss—If I did not say so, your Honor, I should add the allegations in paragraph six are also admitted by the Answer. Paragraph seven alleges that the time for filing Proof of Loss was extended

from time to time, at the request of the defendant, and that proofs were actually filed on January 4th, 1947.

At this time, your Honor, I should like to offer in evidence the Proofs of Loss filed by the plaintiff.

The Court: That was agreed upon at the pre-trial.

Mr. Levitt: Those Proofs of Loss are attached to the Herrick deposition, and I see the Clerk now has them in his hands. We ask that they be marked Plaintiff's Exhibit D.

The Court: Was there a supplemental—

Mr. Levitt: There was, your Honor, which I will come to in a moment.

It is alleged in paragraph seven of the Complaint, the amount claimed by the Proof was \$741,004.41. That, of course, [4] was an amount in excess of the total insurance. The amount demanded from each plaintiff is shown on Exhibit C, which has already been offered and admitted.

Mr. Whitacker: I don't understand that, Mr. Levitt. You say the amount demanded is shown on Exhibit C.

Mr. Levitt: Yes.

Mr. Whitacker: Plaintiff's Exhibit C has to do with the breakdown of the amount paid and the amount tendered under the appraised findings, does it not—it does not deal with the amount demanded.

Mr. Levitt: Counsel would appear to be correct on that. I should say that actually it does show on Exhibit C and Column A—in other words, Column

A is the face amount of each policy. Since the loss called for by the Proofs of Loss was in excess of the face of the policy—it would follow that the amount demanded of each plaintiff was the face amount of each policy—the Column A will actually show that. That allegation of the paragraph is admitted by the Answer.

Paragraph eight of the Complaint alleges that a Notice of Defect in it, or alleged defect in the Proof of Loss, and a request for a Verified Amendments were made or served on January 27, 1947, and within the time provided by the policy, and on February 6, 1947, the defendant furnished its reply to that request, entitled "Reply Affidavit." We now offer in evidence, as Plaintiff's Exhibit next in order, the Reply [5] Affidavit, a printed document, and I had hoped Counsel would be able to furnish me a copy of it.

Mr. Whitacker: I think I can right now.

Mr. Levitt: We now offer in evidence the printed Reply Affidavit, referred to in paragraph eight of the Complaint, the copy having been received just now from Counsel for the defendant. Counsel calls my attention to the fact that there is a certain amount of underscoring and some ink writing—very little on the document, and it will be understood those interlineations are not offered at all.

The Clerk: Plaintiff's Exhibit E in evidence.

Mr. Levitt: The allegations of paragraph eight of the Complaint are admitted by the Answer.

Paragraph nine alleges the plaintiffs disagreed

with the amount of the losses claimed in the Proof, and sent a Notice of Disagreement on February 10th, 1947, in accordance with the policy provisions, and those allegations are admitted.

Paragraph ten alleges, and I will divide this paragraph into two parts: A. That the parties failed to agree within ten days on the value of the sum of the insurance, as to the amount of loss, and the Answer to that is admitted. Failure to agree on the amount of the loss alleged, and no attempt by the parties to agree on the value of the sum of the insurance, so we think that is sufficient admission to alleviate the necessity of any proof of the subject on our part. [6]

Part B of paragraph ten also alleges, on February 2nd, 1947, within the time provided by the policy, plaintiffs demanded an appraisement in writing, and named a competent and a disinterested appraiser. The defendant appointed a competent and disinterested appraiser, and the two appraisers, before commencing the appraising, selected a competent, disinterested umpire. The Answer admits the appraisal demanded on the date stated, within the time provided by the policies, which is admitted, each party to appoint an appraiser, and the two were to select an umpire before commencing the appraisement. In the original Answer, the further allegation that the defendant was without knowledge as to whether the umpire and appraiser appointed by the insurer was a competent and disinterested person, that has been

eliminated by an Amendment, there is no issue as to either the competency or disinterested qualifications of the appraisers, including the umpire.

Paragraph eleven alleges that the appraisers and umpires asked for, and pursuant to the provisions of the policy, time for the completion of the appraisal, which was extended by both parties to May 3rd, 1947. An award dated May 1, 1947, signed by both appraisers and the umpire, was made, and in that award value and loss were estimated and appraised, that sound value and damages separately stated all in accordance with the proof of the policy. The paragraph [7] then summarizes the award, and we now offer in evidence a duplicate original of the award, and ask that this be marked Plaintiffs' next in order—I should say.

The Clerk: Plaintiffs' Exhibit F in evidence.

Mr. Levitt: I should say the date of award is shown as May the 2nd instead of May the 3rd. The allegations of that paragraph, if your Honor will recall, were admitted; I believe that is the paragraph which Counsel pointed out and asked leave to amend and make certain minor denials. In other words, he denied, I think, the allegation that it was all done in accordance with the proof of the policy, not to be in a position of having admitted the validity of the award.

The Court: The document—there is no need of laying the foundation, the document is admitted.

Mr. Lovitt: That is right.

Mr. Levitt: To summarize the award for the

Court, I assume, as we go through the trial, it will be agreeable that the documents offered in evidence by either side are presumed to be read, and either Counsel may point out such parts of the document to the Court as he wishes.

Mr. Whitacker: That is quite agreeable with us, your Honor.

Mr. Lovitt: The award, I think I should read it—it is short. [8]

(Reading):

“The undersigned, Frank Mahoney and Mansen Herrick, duly appointed appraisers, respectively, by the Fire Company Adjustment, Inc., on behalf of the insurers, and insured, and the undersigned, Louis Lilly, duly selected by the said appraisers as umpire, all under the provisions of the California standard form Fire Insurance Policy relating to the ascertainment of loss. After consideration of all facts and arguments presented, a hearing held in San Francisco on March 26 and 27, 1947. Undated briefs filed on behalf of the insured by counsel—and in a letter, dated April 4, 1947, to the appraisers, filed by Kenneth W. Witter on behalf of the Insurance Company and—find as follows:

(1) The effective profit prevented and fixed charges and continuing expenses during the period July 8, 1945, to April, 1946, reduced by profit realized and fixed charges and continuing expenses, recovered by partial operation following the fire, amounted to \$591,000.00. (2) The net profit pre-

vented, and charges and expenses which would probably have been earned during the period of twelve months immediately following the fire, amounted to \$1,030,000.00.”

I might point out for your Honor, that the policy was [9] insured against loss of net profit and continuing charges and expenses. Another section of the policy also provides for what are known as exceeding costs and additional expenses incurred, and so forth. The policy covered a period—a maximum loss period of nine months. That was the loss period, and the maximum time for which loss of net profit and fixed charges could be recovered. Therefore, the period mentioned in paragraph 1, which total, \$581,000.00—the period of nine months from the day after the fire, July 8, 1945, to April 7, 1946. Now, you will note that the paragraph of the award says that the amount found as the total of net profit and continuing charges and expenses was reduced in the arrival at this figure of \$581,000.00. The profit earned and the fixed charges recovered through partial operation after the fire, as to the \$581,000.00 is a net figure.

The second paragraph is a finding of the value of the sum of insurance. In other words, it is necessary, in order to bring the average clause, under the contribution clause, referred to in the pre-trial hearing, to know what the total insurable values were. The total insurable values are based upon a year; in other words, the way the use and occupancy policies are written—they are written for

intervals of a year, and the insured can purchase that kind of a policy, but is limited to the loss of recovery period, a lesser period, which he seeks at this time to do in this case. He is limited [10] to nine months to the average clause on a year basis. The year following the fire, in order to apply that to see if there is enough insurance necessary to have the figure of the total net profit prevented and charges and expenses that would normally have been ended in the twelve months immediately following the fire, that is the million dollar figure stated by the appraisers. That figure resulted in a penalty under the average clause, which I think is the dispute, and we will come to that in a moment. They didn't have enough insurance on the basis of their insurable value.

(3) —reading again from the Award:

“The expenses incurred by the insured, other than those constituted cost of partial operation for the purpose of reducing the loss under this policy, amounted to \$1700 and some odd, which amount does not exceed the amount in which the loss was so reduced. In reaching such findings, the appraisers or umpire did not find it necessary to resolve any legal question or coverage or extent of liability.—Signed, Frank Mahoney, Mansen Herrick, appraisers, and Louis Lilly, umpire.”

And their verifications are attached by Mr. Mahoney in Sacramento on May 2nd, and by Mr. Herrick and Mr. Lilly in San Francisco on May

3rd, but the award itself is dated at the bottom May 1st, 1947.

Paragraph twelve of the Complaint alleges that by the [11] application of profit of the policy to the award, and I have particular reference there, of course, to the contribution clause, the aggregate amount payable to the defendant is \$491,378.41, amount payable by each plaintiff's proportion thereof, as shown on Exhibit C, Column B.

Now, I assume, Counsel, there is no issue in this case as to the correctness of that portion of paragraph 11. In other words, you will concede by applying the contribution clause to the award itself, assuming it to be correct for the purposes of this point, that it is the correct amount to be paid by the company and is \$491,378.41.

Mr. Whitaker: That is correct, that is the amount, your Honor, which is produced by applying the contribution clause factor to the figures found in the appraisers' findings.

Mr. Levitt: It is also alleged in that paragraph, between May 26 and 28, 1947, and within the time provided by the policies, each plaintiff tendered to the defendant the full amount payable by itself, less the amount of the advance payment of Column C of Exhibit C. It is admitted in the Answer that some of the Companies did advance or tender the amount of the award, and I will come to that in paragraph 13, which recites in the Complaint that tender by each of the plaintiffs were refused by the defendant. The defendant said that they would

dispute the validity of the award, and claimed to be entitled to an amount substantially in excess of those tendered [12] and presumed the amount demanded on Proof of Loss was equal to the face amount of the policy, less the advance payment. That allegation is admitted by the Answer.

What actually happened, and I think Counsel will agree to this, is that tenders were made promptly by some of the plaintiffs, but that equally as promptly the attorney for the defendant notified the adjuster for the Insurance Company that the defendant would not accept the amount found to be due, and it tended to dispute the validity of the award, and filing a suit under the policies.

The Court: I understood Mr. Whitaker at the pre-trial conference as not making any amount, but wanted a tender made by each of them.

Mr. Whitaker: You understand me correctly.

Mr. Levitt: Also that the drafts that were tendered were returned by Pickering, and not cashed.

I would like to offer in evidence at this time the original letter dated May 26, 1947, written by Judge Barnett, Paul Barnett, who was then acting as chief counsel for Pickering, addressed to Mr. K. W. Witters, Fire Company Adjustment Bureau, Inc., as Plaintiff's Exhibit next in order.

The Clerk: Plaintiffs' Exhibit G in evidence.

Mr. Levitt: I will offer as the next Exhibit of the Plaintiff—

The Court (Interrupting): Just a minute. What was [13] the substance of that?

Mr. Levitt: I was waiting for the Clerk to mark it.

This letter is written by the attorney for Pickering, to the adjuster for the Insurance Company, and reads as follows (reading):

“Mr. Jack Collins of Cosgrove and Company——”

Will it be stipulated Cosgrove and Company were the brokers for Pickering in this matter?

Mr. Whitaker: I don't know whether they were brokers or agents, if that makes any difference.

Mr. Levitt: They were acting for Pickering, they weren't agents for any insurance company.

Mr. Whitaker: They were the people through whom Pickering purchased the policy.

Mr. Levitt: Notifying Mr. Ben Johnston, the Chairman of the Board of the Pickering Lumber Company, that you had communicated with him, and gave him the distributions of the amount of the award, and all the use and occupancy of business interruption policies held by Pickering Lumber Company, and I presume furnished the distributions in order that he might check his account for Pickering, and it says that Pickering Lumber Corporation intends to dispute the validity and bring suit upon us—and I am very glad to have met you, and so forth.

We now have a copy of a letter from Cosgrove, dated May 29, 1947, addressed to the Fireman's Fund Insurance Company, [14] and ask that it be marked next Exhibit for the Plaintiff.

The Clerk: Plaintiff's Exhibit H in evidence.

Mr. Levitt: This letter, your Honor, is addressed to the Firemen's Fund Insurance Company, and refers to this loss we are talking about, and to a particular fire loss draft in the amount of \$6303.30, and reads (reading):

"We have been instructed by Judge Barnett, general counsel for Pickering Lumber Corporation, to return the above draft in accordance with notification to Mr. Kenneth W. Witters, chief adjuster. We intend to protest the award of appraisers in connection with these losses. Yours very truly."

Mr. Levitt: Will it be stipulated, Counsel, I assume, that similar letters of return were sent, and drafts were returned to all other companies that made the tender?

Mr. Whitaker: So stipulated.

Mr. Levitt: Paragraph fourteen alleges that the amount paid and tendered by the plaintiffs is the full amount to which the defendant is entitled under the policy, and that the appraisals and awards are valid and binding on both parties. That allegation, of course, is categorically denied by the Answer.

Paragraph fifteen is an allegation to the effect that if the Court should decree the award invalid, then we wish the [15] Court to fix the amount of the loss proportionately on the ability of each insurer. In that event, their loss would be substantially less than the amount fixed by the award, and that last allegation is, of course, also denied.

Paragraph sixteen alleges that the defendant threatens to institute separate action on each policy, and so forth, and that is all denied in general.

The prayer of the Complaint is that the appraisal award is valid and binding, and the amount payable by each plaintiff is the amount tendered, as shown in Column B, of Exhibit C, and the prayer goes on to cover all alternative matters as well.

At this time, your Honor, the plaintiff rests.

Mr. Whitaker: Call Mr. Momeyer.

FRANK MOMEYER

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Will you state your full name to the Court? A. Frank Momeyer.

Direct Examination

By Mr. Whitaker:

Q. Will you state your name, please?

A. Frank Momeyer.

Q. Where do you live?

A. Sonora, California.

Q. Are you an official of the Pickering Lumber Corporation? [16] A. Yes, I am.

Q. What office do you hold in the Corporation?

A. I am Treasurer and Auditor of the Company, and also Assistant Secretary.

Q. Have you been with the Company for many years, Mr. Momeyer?

(Testimony of Frank Momeyer.)

A. Yes, sir, since 1924, I believe.

Q. Describe for the Court, in a brief, general way, the nature of the business in which the Pickering Corporation is engaged.

A. We carry on a complete sawmill, box factory operation, including the timber operation, the logging operation, bringing in of the logs, and manufacturing the logs into lumber or boxes. We have a planing mill, a dry kiln, and various other units that go into the manufacture of our product.

Q. In connection therewith, do you own now, and operate, a large forest?

Mr. Levitt: I couldn't understand that.

Q. (By Mr. Whitaker): Do you operate a large forest in connection therewith?

A. Yes, we own some eight hundred million feet of timber, and this timber is used in our operation, that is the Standard manufacture of lumber and boxes.

The Court: Where is Standard?

A. About five miles from Sonora, and Sonora is located about 135 miles east of here.

Q. (By Mr. Whitaker): Is has been put in evidence, on [17] plaintiffs' case, that your Company held policies of business interruption insurance of the character shown in Exhibits A and B, with thirty-seven different Companies, aggregating \$651,000.00 in principal amount; is that correct, Mr. Momeyer?

A. That is right.

Q. And now, Exhibit A is the so-called printed

(Testimony of Frank Momeyer.)

portion of the policy, and Exhibit B is the so-called typewritten attachment to the printed form or policy; is that not right? A. That is correct.

Mr. Levitt: It wasn't typewritten, Counsel. It was actually mimeographed.

Mr. Whitaker: I accept the amendment.

Q. (By Mr. Whitaker): Now, those policies were identical in terms, except for the name of the Company issuing them, the specific several amounts, and the name of the person signing the policy; is that not correct? A. That is correct.

The Court: Mr. Whitaker, I would like to take a recess for about five minutes.

(A short recess was called.)

Q. (By Mr. Whitaker): Were those policies in full force and effect on the 7th day of July, 1945?

A. They were.

Q. On that day, did a fire occur in this plant?

A. It did.

Q. Which portions of the plant were destroyed by that fire——[18]

Mr. Levitt (Interrupting): If the Court please, I assume this question is a preliminary question, and I won't object at this time. I want to point out, I intend to make an objection to the question when Counsel gets into any discussion of the loss itself and details of the loss suffered.

The Court: It is preliminary, I will let it stand.

The Witness: The sawmill burned, also what we call green chain attached to the sawmill building.

(Testimony of Frank Momeyer.)

The Court: What kind of a chain?

A. What we call a green chain, or green sorter—where the green lumber is sorted.

Q. (By Mr. Whitaker): That is really a part of the mill, Mr. Momeyer?

A. Attached to it—it is really a separate structure. The part of the power house—there is two power houses.

Q. Were they damaged?

A. Not completely, because it is a brick structure. The fuel house was destroyed, the fuel house is used for storing the shavings and sawdust, and so forth, used in the power house; this was completely destroyed. That, I believe, is the direct damage caused by the fire.

Q. Was the box factory reached by the fire?

A. It was not reached by the fire.

Q. Was it in operable condition after the fire?

A. It was not for a few days. [19]

Q. Why?

A. Because, in order to dispose of the sawdust and waste material coming from the box factory, we have a blower system that actually blows that sawdust and refuse through a pipe, a distance of about a quarter of a mile from the box factory, to this fuel house I mentioned. When the fuel house burned, the connection, of course, of the blow pipe to the fuel house was damaged by the fire.

Q. And was that blow pipe matter corrected within a few days? A. Yes, it was.

(Testimony of Frank Momeyer.)

Q. And was the box factory then operable?

A. It was.

Q. Was it operated from that time forth, to the exhaustion of your lumber? A. It was.

Q. Did the fire suspend logging ability?

A. It did not.

Q. Were logging operations continued after the fire?

A. They were, for a period of about three months.

Q. Until October 8, 1945, I believe?

A. That is right.

Q. The mill, as it turned out, was entirely suspended, because of this destruction, and not rebuilt for more than a year, is that not true?

A. That is right. [20]

Q. Upon the occurrence of the fire, did you have on hand lumber that had been manufactured or processed to a certain point for use in the box factory? A. We did.

Q. Did you have logs cut and on hand, at the time of the fire? A. We did.

Q. After the fire had gone on—had occurred, and these operations that you have mentioned had continued, did you prepare and file with the Insurance Company, on the date mentioned by Mr. Lovitt, January 24, 1947, the Proof of Loss, Exhibit D?

A. We did.

Q. Now, let me go for a moment to this phase: What was done soon after the fire, if anything was

(Testimony of Frank Momeyer.)

done, with respect to the arrangement for reconstruction of the mill?

A. We immediately gave consideration to——

Mr. Levitt (Interrupting): Pardon me, Mr. Momeyer. I think, your Honor, that in order to keep the record straight, I should perhaps interpose my objection at this time. Counsel is now beginning to go into the details of what occurred after the fire, and I am afraid that, although I thought at first it would be possible to draw a line at this point, he is beginning to prove or attempt to prove grounds for an attack on the award. I don't believe it is possible to draw that line; therefore, I would like to have permission to have the answer the witness so far has given, stricken, and have a chance to make my objection.

The Court: I will strike the answer for that purpose. I think, Mr. Levitt, you can make your objection; then, if I do not sustain it, you may have an objection to all this line of examination, so you won't have to reiterate all the time.

Mr. Levitt: I had that in mind. At this time, your Honor, I should like to interpose an objection on the ground that it has no issue in this case presented with the pleadings, with respect to the validity of the award, and that any testimony to be elicited in connection with actual events that occurred—actual loss that might have occurred from this witness or others, after the fire, is irrelevant on any issues in the case. Basically, the objection

(Testimony of Frank Momeyer.)

is, in effect, a general demurrer or motion to dismiss as to Count One of the Counter Claim, which is, of course, embodied in the Answer itself, by reference——

The Court (Interrupting): Basically, won't your objection go just along the lines stated in your Brief?

Mr. Levitt: Substantially so; yes, I don't—I would like to point this out to your Honor: That the plaintiff, so far as the validity of the award is concerned, rests—upon—behind two lines of defense.

The first, as I already stated, your Honor, has pointed [22] out that the Answer of Counter Claim would be an attack on the award, failing to state any valid grounds upon which—even assuming all the facts are established as alleged by one—the award could legally be set aside by this Court.

Our second line of defense, of course, is that, even assuming that your Honor admitted the testimony, and assuming that your Honor decided at least tentatively for the purpose of the trial a legal basis alleged for setting aside the award, it is our contention that no errors were actually made by the appraisers, and that the award is fair and equitable, with perhaps minor exceptions, where the——

The Court: Of course, I got that all out of your Brief——

Mr. Levitt (Interrupting): This is the only thought I had, if your Honor would care to hear

(Testimony of Frank Momeyer.)

argument, it would be to make something of an analysis of the various points on which the award is being attacked.

The Court: You have done that pretty well in your Brief and in the Pre-Trial conference. For instance, I can tell you without reference to the Briefs, one of them is the question of whether or not these lumber—processed lumber was to be taken in at the O.P.A. price, as appraised, or at the average cost or allocated cost, the O.P.A. price, and allocated cost—the award would be just the same as it is now, or practically the same.

Mr. Levitt: For—if allocated cost had been used, [23] the award would have been less.

The Court: I mean, less.

Mr. Levitt: The question was, as a matter of fact, the O.P.A. price is such—not necessarily used, they were merely used as the basis on which the figure was arrived at. I don't wish to unduly prolong the hearing itself; we can also argue this same point at a later time; if it may be agreed, then, your Honor, that our objection will go to all the testimony offered by the defendant, with relation to any of the fact pleadings, with respect to the invalidity of the award, we will then forego argument at this time, on the assumption we can argue later.

The Court: I would like to give the defendants the opportunity of proving what they claim to be a ground for setting aside these awards. It doesn't seem to me that they have to go into it in great

(Testimony of Frank Momeyer.)

detail, because generally it is conceded that one basis was used by the appraisers, and another basis is what they claim should have been used.

Mr. Levitt: Except this, your Honor, in view of our second line of defense that I mentioned, we are going to have to show, and I believe we can show your Honor, that actually, taking all the facts into consideration, the appraisers did make a fair and equitable award on each of those points. Therefore, in any sense, it would be a waste of time. But if your Honor is going to permit them to go into detail, we [24] will have to go into detail on cross-examination in our case——

The Court: Can't we confine ourself just down to those four points?

Mr. Levitt: We would definitely raise further objection to any attempt to raise points that were not in the pleadings, in opposition to the award.

The Court: I mean, in the introduction of evidence, there is no need of much preliminary evidence.

Mr. Levitt: I would like to say, your Honor, and this has nothing to do with the objection, I neglected to say at the outset, the term "appraise" or "appraisement," as opposed to arbitrate, or arbitration, are two terms frequently used and interchangeable by the Court. I want to make clear for the record, any reference I make to appraisal or arbitration—I do not intend to in any way reflect any difference or dissimilarity between the three,

(Testimony of Frank Momeyer.)

but merely I will use the word indiscriminately, unless I can direct myself particularly——

The Court (Interrupting): I understand that this is the position you have taken here and in your Briefs.

Mr. Levitt: That is right.

Q. (By Mr. Whitaker): And now, then, Mr. Momeyer——

The Court: Your question—last question was whether or not you proceeded—could proceed immediately to take steps to have the mill rehabilitated.

Q. (By Mr. Whitaker): That is it. Did you?

A. Yes.

Q. Explain very briefly to the Court—we don't want to take a lot of time on this matter, it is preliminary—what you did.

A. On or about July 12, that was just before—five days after the fire, we contacted E. D. Filer and Stole Company, representatives, for the purpose of finding out whether they could furnish the sawmill machinery promptly—they are one of the largest builders of sawmill machinery. On the assurance they could start building our sawmill machinery, on about September 1st they would start shipping it—around October 1st we finally gave them the contract for the building of our mill machinery—they expected to develop one side of the mill first—about January 15th or February 1st——

(Testimony of Frank Momeyer.)

Q. (Interrupting): Of 1946?

A. Of 1946, we thought we could have one side of our mill in operation by that time, on the information they gave us.

Q. Were both those sides the same size?

A. No, there is what we call a large side and a small side of the mill, what we call a two-sided mill, or two head rigs; usually one side has a large side, and the other side has a small side, and the big side or large side is used for sawing the larger logs, and the small side for the smaller logs.

Q. Which side of the mill was to be furnished and installed first? A. The large side. [26]

Q. What were your normal operations at the time of the fire—I mean, with respect to shifts and hours?

A. We were operating a day and night shift, eight hours each, at the time of the fire, I believe.

Q. Operating two shifts of that duration, using the big side of the mill, how many board feet per day are cut?

A. From 200 to 200 and 25 thousand feet per day.

Q. The Company had down, I believe you said it did have down and cut on hand at the time of the fire, certain logs? A. It did.

Q. Can you tell us the number of board feet, mill scale?

A. Right around nine million feet.

Q. Was it 9,550,000 feet? Will you look, please?

(Testimony of Frank Momeyer.)

Mr. Levitt: We will stipulate.

A. (Interrupting): 9,559,000.

Q. (By Mr. Whitaker): Then was the term——

The Court: That is finished lumber?

The Witness: That was logs, your Honor, logs on the ground—in the woods, or in the pond, or in the deck, not yet through the sawmill.

Q. (By Mr. Whitaker): How many of those logs were in the pond, at the mill site?

A. Slightly over 4,000,000, I believe.

Q. And where were the rest of them?

A. The rest of the logs were either in the deck, at the plant—[27] a small footage was in the deck at the plant, on the ground, in the woods, or stored at the rail head, ready for transporting to the mill from the logging operations.

Q. Was any determination made after the fire, and after this arrangement with Filer and Stole, for the reconstruction of the mill you have stated, to cut more logs? A. Yes.

Q. How many more logs was determined to cut?

A. Approximately 6,000,000 more logs.

Q. And now, under paragraph ten of the policy, there is in it—there is a covenant that you are to engage in partial operation as soon as practical, to the extent possible of reducing logs?

A. That is correct.

Q. And now, when did you resume logging?

A. Within a few days after the fire, we resumed the hauling in of the logs that were on the ground,

(Testimony of Frank Momeyer.)

because we felt they would have to be brought into the plant, regardless of what we did about bringing in other logs that had not yet been felled. I think it was about July 27th we actually started to fall some more timber for the purpose of bringing in the 6,000,000 feet approximately—that is what we decided to bring in addition to that.

Mr. Levitt: What was that date?

A. I believe around July 27th, I think. [28]

Q. (By Mr. Whitaker): And was the cutting of the logs then resumed? A. It was.

Q. What type of timber were you cutting at that time of the fire?

A. In pine and fir, and cedar. Ponderosa pine, sugar pine, fir, and cedar,—cutting heavy on the pine, about 60% pine.

Q. Did you continue cutting after the fire, in that forest—that kind of timber?

A. We did not.

Q. Did you move the logging operations—the cutting operations, I mean, after the fire, to other areas? A. Yes, we did.

Q. To what area?

A. To an area that was practically all fir timber.

Q. Why?

A. Because fir logs are not subject to depreciation that occurs in pine logs; that is, there is—they are not subject to as much depreciation, weather conditions and stain.

Q. Was that fir area to which you moved—strike

(Testimony of Frank Momeyer.)

that, please. Why was that an important fact, that the fir was not as subject to depreciation or deterioration as pine——

Mr. Levitt (Interrupting): I will——

Mr. Whitaker (Interrupting): He said he moved to a fir area, which was important——[29]

Mr. Levitt: I will object to that, on the ground that it is calling for the conclusion of the witness.

The Court: I think he is familiar with it. I will allow it to be answered.

Q. (By Mr. Whitaker): Why was it done?

A. Because we were in the hot season of the year in July, and pine logs will stain very badly at that time of the year. We didn't want to take a chance of accumulating more pine logs that would be subject to a terrible loss from depreciation.

Q. Was it obvious that these logs would be cut in the regular mill—in the regular mill length of time after cut, or that there would be a further delay than is normal?

A. That there would be more than a normal delay in cutting them.

Q. Was that fir area, to which the cutting operation was moved after the fire, closer to the log railroad, and logging camp, or further?

A. It was farther away.

Q. Did the loggers have a particular place where they lived?

A. Yes, they lived at one of the centralized logging camps.

(Testimony of Frank Momeyer.)

Q. In the mountains?

A. In the mountains.

Q. And do they return to that place each evening?

A. They do.

Q. Was there, or was there not, a further distance to travel [30] to the new logging area than to the old?

A. It was a greater distance of travel.

Q. Were there roads to the new logging area—the fir area?

A. There were some roads that had been used in the past on other areas, but they had to be extended and rehabilitated before they could be used for this new operation.

Q. How were the logs brought from the forest fir area, where cut, to the logging railroad?

A. They were brought by large trucks.

Q. Where were those trucks kept?

A. They are kept at the main logging camp.

Q. Was there any greater distance in hauling logs than before?

A. Yes, there was a greater distance.

Q. Could the logging trucks make—haul as many feet of logs, make as many trips from this fir area, as from the pine?

A. No, they could not, they made less round trips per day.

Q. Was this logging of the fir conducted at your maximum capacity for logging logs?

A. No, it was not.

(Testimony of Frank Momeyer.)

Q. Why?

A. Because we were going at too great—approximately 6,000,000 feet of logs, and it wouldn't be practical to set up a maximum logging operation to bring in the small footage.

Q. Did that enable you to have to dispense with your logging superintendent, and the like overseeing personnel? [31]

A. It did not.

Q. How many feet of logs were, in fact, cut after the fire to October 8th?

A. 5,800,000 feet, just slightly over.

Mr. Levitt: How many feet?

A. 5,800,000 feet—just slightly over.

Q. (By Mr. Whitaker): How many feet of logs were brought into the mill after the fire, including those cut before the fire, as well as after the fire?

A. About 11,000,000.

Q. And now, under the terms of this policy, did you credit the claim that you included in your Proof of Loss with the amount of fixed, general logging overhead expenses, recovered from that partial logging operation?

Mr. Levitt: You are speaking now of the claim itself, Counsel?

Mr. Whitaker: The Proof of Loss, yes. I may say—I would like to say to His Honor and to Counsel that it is not my purpose here to prove the facts and amounts with the exactness at this time; I am merely leading up to show how the claim of the Proof of Loss was constituted.

(Testimony of Frank Momeyer.)

Q. (By Mr. Whitaker): Have you my question in mind?

The Court: Doesn't the Proof of Loss show that, itself?

Mr. Whitaker: Yes, it really does. I think I can make that very brief, if I may. [32]

Q. (By Mr. Whitaker): Are you referring to the Proof of Loss? A. I am.

Q. Please point out, state where the Proof of Loss credits the claim with the recovered fixed charges and the expenses of the partial logging operations.

A. On page 20 of the Proof of Loss, Schedule Roman numeral III, you will find a summary of the recovery by partial operation—the recovery in particular of this logging operation recovery that we are talking about would be found on Schedule R-1, on page 21, of the Proof of Loss.

Q. What was the rate per thousand feet that you credited in that claim as the recovery of fixed charges and continuing expenses by partial logging operations?

A. \$5.32 — 5.31993, being carried out to five places, approximately \$5.32.

Q. That was allowed on the full 11,301,377 feet of logs, brought to the mill after the fire?

A. That is correct.

Q. And that \$5.31993, times 11,301,877, is \$60,-125.19? A. Correct.

Q. Was the Proof of Loss credited in gross with

(Testimony of Frank Momeyer.)

that amount of fixed charges and expenses from partial logging operations? A. It was.

Q. And now, in this claim, this Proof of Loss, in respect to this [33] same subject, did you set up and claim any exact costs for conducting logging operations after the fire? A. We did.

Q. What do you claim the Proof of Loss was your cost of bringing in logs to the mill site before the fire? A. \$21.91.

Q. Is it not 21.9133?

Mr. Levitt: What page, Counsel?

The Witness: Page 22 of the Proof of Loss. 21.91339.

Q. (By Mr. Whitaker): And what was the cost of bringing in the logs to the mill site after the fire?

A. \$25.51592.

Mr. Levitt: Is that the same page——

The Court: That is per thousand?

The Witness: Yes.

Mr. Levitt: Is that the same page?

The Witness: Page 22, yes.

Q. (By Mr. Whitaker): And the difference in bringing in the logs, therefore, before and after the fire, was how much? A. \$3.60.

Q. And that \$3.60, times 11,000,000 feet of logs, brought in after the fire, was how many dollars?

A. \$40,715.40.

Q. By the way, in that connection, did the logging cost—the cost of bringing in the logs, remain about the same from [34] the beginning of the log-

(Testimony of Frank Momeyer.)

ging operation, to the end of the season, or is there some change?

A. There is a change during the maximum production period of the season.

Q. Will you very briefly explain why?

A. We log generally from about April 15th—to May 1st, to November 30th of each year. When you start your operation in April or May, you have weather problems to deal with; the roads are not dried out yet, and various other problems of getting the operation started. Your overhead expenses continue at the same rate as they would if you had maximum production, but you are unable to get your maximum production at the start of the season, because of the difficulty of getting started, and so forth. Therefore, the rate per thousand is higher at the beginning of the season than it is after two or three months of the season, by getting into the good-weather period of the season. When you are in the good-weather season, and you bring in your maximum production, your footage goes up, and your rate per thousand goes down—your cost per thousand.

Q. Was that true in the loss year—the year following the fire?

A. It was not; the cost went up during the period that normally would be a low cost period.

Q. This amount you stated—\$3.60 per thousand?

A. That is right.

Q. Now, what did you do with those logs—those

(Testimony of Frank Momeyer.)

eleven million, some odd thousand feet that were brought in the mill site, after the fire?

A. We had to deck practically all of them.

Q. By "deck," what do you mean?

A. Standing them in rows, like you stand up cords of wood, as in your home, perhaps.

Q. Why don't you just let them lie on the ground?

A. Because the weather condition would cause greater depreciation.

Q. Did you have any more room in the pond, in which to put these logs?

A. No, very little room—the pond was practically full of logs at the time the fire occurred.

Q. Did you have a decking yard at the mill site, at the time of the fire? A. We did have.

Q. Was it large enough to accommodate as many logs as were brought in after the fire?

A. It was not.

Q. Was it necessary for you to extend the decking yard?

A. Yes, it was necessary for us to enlarge it and build fir tracks to our railroad, to accommodate the new area we were going to use for decking. [36]

Q. Did that cost money? A. It did.

Q. How much?

A. The total cost of the work, plus the actual expense of putting them in the deck, the actual lifting of the logs in the car and putting them in the deck, amounted to \$12,492.35.

(Testimony of Frank Momeyer.)

Q. Normally, would you have, if the mill had been operating, had to lift those logs from the car and put them in this deck?

A. Not that quantity; we would deck a small footage, nothing like the quantity we had after the fire.

Q. These extra logging costs that you have mentioned, and the extra decking expense, were in the claim, that Proof of Loss filed with the insurer, or plaintiff, deducted from the gross recovery of the \$6,125.19, is that not true?

A. They were actually not handled in the same schedule, but they were considered as a part of that partial logging operation.

Q. And deducted from that gross recovery?

A. That is right.

Q. And in the schedule which you have—I will withdraw the question, please.

Q. By the way, Mr. Momeyer, did the machinery ordered from Filer and Stole arrive on schedule—the sawmill machinery?

A. It did not. [37]

Q. Why not?

A. Shortly after Filer and Stole started to build our machinery, on October 8th, I believe it was October 8th, 1945—

Q. (Interrupting) You don't mean that is when they started to build?

A. Shortly after they started to build the machinery, they started around September 1st, 1945—

(Testimony of Frank Momeyer.)

about October 8th, 1945, a strike occurred at their plant, and the balance of our machinery stopped.

Q. How long did that strike continue?

A. Until about April, 1946, or sometime in April, 1946.

Q. And meanwhile, did you cut any more logs in the woods after that date, October 8th, when you got word of that strike? A. We did not.

Q. And did these logs that were on hand at the time of the fire, and that had been cut after the fire, prior to October 8th, remain at the mill—remain until the mill was finally in operation?

A. In the logging deck, or in the pond.

Q. When did you finally get the one side of the mill in operation?

A. On August the 1st, 1946.

Q. I believe I omitted to ask you preliminarily, did you, at or about the time you made this agreement with Filer and [38] Stole for the manufacture and supplying of the sawmill machinery, also contract with others for the construction of the mill—the construction of the building? A. We did.

Q. And who was that?

A. H. H. Larson and Company, contractors, located here in San Francisco, the head office.

Q. And was the structure to be ready to receive the mill machinery, as it arrived? A. It was.

Q. On August 1, 1946, you say one side of the mill was in operation—ready to operate?

A. That is correct.

(Testimony of Frank Momeyer.)

Q. And now, had you any intention up to that time to make any test cuts in the logs in the deck and in the pond, to determine what their condition was?

A. We did.

Q. Was it not obvious, from the external examination, there had been deterioration?

A. It was quite obvious, there was substantial deterioration.

Q. Did the Company take any steps to have significant tests made to determine the amount of such depreciation, and when it had occurred?

A. It did.

Q. Please explain very briefly to the Court what steps you [39] took?

A. We realized that an expert would be needed to determine the amount of depreciation and the period in which the depreciation had occurred. Therefore——

Q. (Interrupting) May I interrupt right there? Why did you want to know the period in which it occurred?

A. Because we could not make our Proof of Loss without knowing how much occurred in the nine months' period following the fire, and how much occurred in the twelve months' period following the fire.

Q. All right, continue.

A. We then contacted the Western Pine Association, who are located at Portland, Oregon, and told them our problem, and asked them to send us

(Testimony of Frank Momeyer.)

a man that could make a test run of these logs, and calculate for us the amount of depreciation on the logs. They sent one of their lumber inspectors, Lee Moffit, to do this work. We also at the same time, because Mr. Moffit had told us that he could not tell which period the depreciation occurred—we then contacted Mr. Henry Thomas, who is a timber expert, also located at Portland, Oregon, and asked him to come to our plant and watch the work that Mr. Moffit was doing, and that we were going to ask him to determine for us the period in which the depreciation occurred, whether in the nine months' period or the twelve months' period following [40] the fire, or after the twelve months' period.

Q. Did Mr. Moffit arrive and Mr. Thomas also?

A. Yes, they arrived around November 1, 1946.

Q. Did Mr. Moffit select a representative sample of logs in the deck and in the pond?

Mr. Levitt: I will object to that, on the ground it is calling for the conclusion of the witness.

The Court: I think I will let him answer it.

Mr. Levitt: Counsel, do you want to introduce the report, or anything like that? I don't think we will object to that, as far as it is concerned.

Mr. Whitaker: The report is here. It is in detail. I thought you had a copy of it—I thought we would just cover it generally; I don't believe there will be any need to clutter the record with a long document.

Mr. Levitt: Your question, you see, was directed

(Testimony of Frank Momeyer.)

to the point of having this witness testify of his own knowledge, as to the validity of the tests. I am not objecting to his testimony of what the test shows, I only don't think it is proper to prove what these people did, or what they thought, by this witness; that is my point in objecting.

The Court: I think you are right about that. I thought he was just bringing in generally the facts whether that there was some depreciation.

Mr. Levitt: I have no objection to that. [41]

The Court: Whether they were correct or not.

Q. (By Mr. Whitaker): How many feet of logs were selected by Mr. Thomas, if you know, to run through the mill for these tests?

Mr. Levitt: Can't we get to the conclusion, Counsel, what they found?

The Court: In other words, it was a spot test, was it?

The Witness: That is right, Your Honor, about 200,000 feet.

The Court: And they reached a certain conclusion?

The Witness: That is correct.

Mr. Whitaker: Let's get to that.

Q. (By Mr. Whitaker): Speaking with reference to that time, what damage did they find?

A. Stain, check rot, and brashness.

Q. Now, treating with the check rot, how much per thousand feet on sugar pine did they find that damage had amounted to?

(Testimony of Frank Momeyer.)

A. \$9.69 per thousand.

Q. On how many feet of the sugar pine?

A. 1,820,067 feet.

Mr. Levitt: May I suggest this: You asked me if I would have any objection, on pre-trial, any objection to your introducing the record generally to establish what damage there was, and whether or not it was correct. If it is merely to show that Pickering had a record, I am perfectly willing [42] to stipulate that Pickering had a record—and perfectly willing to stipulate to the amount of alleged depreciation and what was said by these people. Do we have to go in all these details?

The Court: I think it would be sufficient.

Mr. Whitaker: May I read it into the record, then, the summary as shown in the examination and from this report, or have the witness do it?

Mr. Levitt: Show it to me—what you want to read, and maybe we can stipulate to it.

Mr. Whitaker: Here is what we will read right here.

(A conversation was held out of hearing of the reporter.)

The Court: It is about noon time, gentlemen, and I have a Memorial for Judge St. Sure this afternoon at two o'clock, and then I have a case that was partially argued last night, and it went over to three this afternoon. I wonder if we could continue this until tomorrow morning at ten o'clock?

(Testimony of Frank Momeyer.)

Mr. Levitt: Certainly.

The Court: I have to be present at two in Judge Roche's court, in connection with this Memorial Service that they are having in there today. You can examine that document in the meantime. We will now stand adjourned.

Certificate of Reporter

I (we) Official Reporter(s) and Official Reporter(s) pro tem, certify that the foregoing transcript of 43 pages is a true and correct transcript of the matter therein contained as reported by me (us) and thereafter reduced to typewriting, to the best of my (our) ability.

/s/ GEORGE WHEELER,

By /s/ ELDON W. RICH.

[Endorsed]: Filed February 23, 1950. [43]

Wednesday, June 8, 1949

The Clerk: Case of American Insurance versus Pickering Lumber.

Mr. Levitt: Your Honor, before we proceed taking testimony, there is one point I would like to clarify for the purpose of the record which counsel stated on pre-trial, that should be clarified in the trial record. In the answer, that is the counter claim which has to do with the attempt to set aside the appraisal award, there are a number of allegations related to procedure on the matters with respect to what the appraisers did, how the proceed-

ings were conducted, for example there is an allegation that there was a single appraisal instead of a separate appraisal on each policy, sort of an implied inference that it was improper, a separate appraisal on each policy.

Mr. Whittaker: May I say in that connection, and to answer one at a time we do not contend that was improper, or irregular, it was done merely to explain the fact that each policy does call for a separate appraisal, we are not complaining about it.

Mr. Levitt: The next point they allege, is that in regard to the hearings that they were granted, that they didn't call any witnesses, except those that appeared without subpoena, and that no subpoenas were actually issued by the appraisers—no allegation that any subpoenas were requested, I would like to state—and I come to state whether he intended to reply on that point. [1]

Mr. Whittaker: I think counsel misconceived the point, that allegation, that was a collateral allegation—a negative idea of arbitration, that is all that was for.

Mr. Levitt: Not one of the grounds of your attack on the award?

Mr. Whittaker: Offered as far as the negative——

Mr. Levitt: (Interrupting) That is a question of law, your Honor.

The Court: I understand the defendant's position of being this was an appraisal, even though the

appraisers had a hearing, weren't required under the policy to do so.

Mr. Levitt: Of course, your Honor, whether arbitration or appraisals, whether the parties weren't subpoenaed or not is something entirely up to them—they didn't ask for any, it wouldn't prove——

Mr. Whittaker: (Interrupting) The same situation exactly as the one I have stated applies to that phrase.

The Court: Just set that up to show the appraisal under——

Mr. Levitt: (Interrupting) We don't concede any relevancy to that point at all. The final one is an allegation that after the hearing, the appraisers obtained testimony, or evidence from parties, and third parties——

Mr. Whittaker: (Interrupting) That is exactly the same position as the one we have stated that the arbitrator had no [2] right to do that, that the appraisers would.

The Court: I understand the position.

Mr. Whittaker: Shall I proceed?

The Court: Yes.

Mr. Whittaker: Mr. Momeyer, will you resume the stand, please?

FRANK MOMEYER

called as a witness on behalf of the defense, being previously sworn, testified as follows:

Mr. Whittaker: Mr. Reporter, I hand you a

(Testimony of Frank Momeyer.)

document and ask that it be marked Defendant's Exhibit——

The Court: (Interrupting) What is the document?

Mr. Whittaker: The profit report.

The Clerk: Defendant's Exhibit 1 for identification.

Mr. Whittaker: I now hand to the Clerk, a document, and ask that it be marked as an exhibit, this is the Thomas report.

The Clerk: Defendant's Exhibit 2 for identification.

Mr. Whittaker: I just want to ask the witness to identify this.

Q. (By Mr. Whittaker): Mr. Momeyer, I hand you what has been identified as Defendant's Exhibit 1, and ask you to state what that is.

A. That is the report of Mr. Lee Moffitt of the Western Pine Lumber Graders on the test run that he made of the logs that we [3] had stored in our log deck following the fire on July 2nd, '45.

Q. I now hand you what has been marked Defendant's Exhibit 2, and ask you to state what that document is?

A. This is a report from Mr. W. H. Thomas, Timber Engineer, Portland, Oregon, reporting to us at the time in which the depreciation on those logs occurred, and the period that he believed it took place following the fire July 7th, '45, as to stain, end checking and other depreciations.

(Testimony of Frank Momeyer.)

Q. Those are photostatic copies which purport to be, is that what they are?

A. They are photostatic copies of the report.

Mr. Levitt: Your Honor, it is going to take me just a few minutes to look at these, I haven't seen them before, they are rather lengthy.

The Court: Would you rather have me take an adjournment for ten minutes while you look it over, is that satisfactory?

Mr. Whittaker: Quite all right by me, your Honor.

(A short recess was called.)

Mr. Whittaker: If the Court please, the defendant now offers in evidence Exhibits 1 and 2, and say to your Honor, that I am not offering them for the purpose of here attempting to establish evidentially the fact of the literal truth of these records, for I realize that is not here in issue, I am offering them for the purpose of showing the basis upon which we constitute the \$36.00 odd claim of the depreciation of the [4] proof of loss.

Mr. Levitt: If I understand——

The Court: (Interrupting) You are not introducing them for the purpose of their contents, merely for the purpose of showing upon what basis—that is, the basis upon which you figure the loss.

Mr. Whittaker: That is substantially correct, your Honor.

Mr. Levitt: May I restate, as I understand it,

(Testimony of Frank Momeyer.)

your Honor, this is one of the items of claim to which they are attempting to set aside the award, is that the logs after the fire suffered depreciation, and we agreed that certain reports were made, and these reports that are referred to as Defendant's Exhibits 1 and 2, were made to the Pickering Company by men who they employed for that purpose, of giving the opinion of these specific individuals with regard to the extent of the depreciation suffered after the fire. And now, these are the two reports giving their opinion, and I understand now, counsel is not offering the report to show the logs actually did suffer the depreciation stated in the report, but merely offering them to show that Pickering had this information in his possession at the time he prepared the claims——

Mr. Whittaker: (Interrupting) That is my purpose at this moment.

The Court: They will be admitted for that purpose, that [5] limited purpose. What is the date of that Moffitt report?

Mr. Whittaker: The date of the Moffitt report is November 22, 1946.

The Court: And the Thomas report?

Mr. Whittaker: The date of it is November 20, 1946 which is number 2.

Mr. Whittaker: In view of the nature of the offering, and receipt of these documents in evidence, unless the Court desires, I shan't read them, I want to do what the Court thinks I should do.

(Testimony of Frank Momeyer.)

Mr. Levitt: I don't have any objection to them reading, that won't change the limited purpose for which they are offered.

Mr. Whittaker: I should then like to read, your Honor, for Defendant's Exhibit 1, not including the logging schedule attached. (Reading) Pickering Lumber Corporation, Standard, California, November 22, 1946. Gentlemen: The writer is a lumber inspector currently and regularly employed by the Western Pine Association to inspect the grade of lumber manufactured by the mills in the Western pine producing areas under the current grading rules of the Western Pine Association. My duties as lumber inspector for the Western Pine Association has been continuous for the past thirteen years. My qualifications to become an inspector for the association include thirteen years previous experience as a grader, as a lumber shipper at [6] several of the large pine mills in California, and Oregon.

One of the functions of the Western Pine Association is to maintain a staff of trained lumber technicians to render service to the manufacturers of pine lumber. As an employee this case was assigned by the Western Pine Association the task of inspecting lumber produced from logs in the deck at the plant located at Standard, California.

It is my information that the sawmill of the Pickering Lumber Company was destroyed by fire on July 7th, 1945. It is my understanding that the logs decked at the plant of the Pickering Lumber Com-

(Testimony of Frank Momeyer.)

pany at Standard, California, were placed in this deck during the late summer and fall of 1945, following the loss of the sawmill by fire.

The object of my task was to determine the grade and quantity of lumber that represented logs from this log deck would produce. This work was begun on November 1 and completed on November 22nd. My first step was to select representative logs of sugar pine, ponderosa pine, white fir, and incensed cedar from this deck. Approximately 88,000 feet of white fir logs were selected, about 60,000 feet of sugar pine, 78,000 feet of ponderosa pine, and approximately 7,300 feet of cedar log were selected. The logs were picked from various locations within these decks, in order that a fair representative sample of different size logs, and different grades of logs in each species might manufacture it to lumber. Only logs with bark on [7] them were selected. The logs which I selected were identified by markings with yellow crayon on the end of the log. These logs were taken out of the deck and dumped into the pond and kept segregated from all other logs.

The sawmill was first cleared of lumber manufactured from other logs, and these sample logs were manufactured into lumber in the usual and normal manner. The writer was present in the sawmill during the sawing of these logs into lumber, and observed the customary sawing methods were employed.

The lumber from these logs was marked with a

(Testimony of Frank Momeyer.)

special distinguishing mark, and it was manufactured, and kept separate and dried separately in the dry kiln. This lumber was also segregated and graded by me under the current grading rule of the Western Pine Association, on three different bases. First the lumber was graded as produced from fresh logs, and without regard to defects appearing in the lumber which had developed in the logs during the period of storage, in other words, just as if the lumber were cut from fresh logs. The timber tally by grade species and sizes was made on this basis, and this is shown in tally 1A. Second, this same lumber was again graded with defects developing in the lumber caused by deterioration of the logs during that storage, and each piece was so marked as to cut off, or ripped if necessary the place—placed the lumber on the grade and in the current salable position, and tally on the next size and grade in which it would have to be [8] shipped to the best advantage under the current grading rules, this is shown in tally number two. Third, logs in the deck were in storage so long that rot, much rot and numerous worm holes developed, this third basis of grading was on the basis of considering the rot, not the defect, and merely giving notice to the stain and some worm holes in the pieces, figuring that the portions of the pieces which was rotten, was also stained before the rot set in.

To obtain tally number three, stained and rotten boards were separated from the ponderosa pine and sugar pine during the first grading (tally 1B).

(Testimony of Frank Momeyer.)

This portion amounted to approximately one-half of the total of the pine. Stains and rot on the boards were then run over the grading table, and graded on the same basis as the first run, except the rot was considered as being only stain.

The items of lumber shown in tally 1A represented boards of little value under ordinary manufacturing methods, and would have been cut for refuse in the mill. The items shown in tally number two and three, are the same boards plus those that have developed from the higher grade class of rot or worm holes.

In making this check, the writer personally graded and marked the grade on each board, and supervised the tallying of the entire stock of lumber developed making these tests as now intact in the shed, and observed the marks placed on each board.

Tally 1A, number two, 1B, and number three, showing the [9] grades and sizes turned out on the three bases. I attach those here for you to use. Your very truly, Lee Moffitt, Inspector for the Western Pine Association and shows schedules that are attached. (Close reading.)

Mr. Whittaker: I now read, your Honor, Defendant's Exhibit No. 2, being on the letterhead of Thomas and Jackson, Forest Engineers, Portland, Oregon, November 20th, 1946.

(Reading) Dear Sir: We according to your request made an inspection of the saw logs you have in the cold deck or in storage at Standard, Cali-

(Testimony of Frank Momeyer.)

fornia. At the present time these cold decks hold all the logs that we felled and/or bucked on July 7th, 1945, and also some additional logs produced after these dates, but before winter had shut down for the purposes of my inspection to determine as closely as possible the deterioration that has occurred to these logs, from July 7th, 1945 to April 7th, 1946, and from April 7th, 1946 to July 7th, 1946, and July 7th, 1946 to date.

As an aid in this determination, a sample of 239 board feet of logs were selected from this cold deck, and converted to lumber which was then carefully tallied and graded. I observed the selection of these log samples, and am convinced it is a fair representation of the logs in the entire cold deck.

After taking into consideration my past experience in deterioration of pine and fir saw logs that have been felled, and bucked in log decks for an unusual period of time, and particularly [10] based on an inspection of the actual sawing of a sample of the logs taken from the log decks at Standard, I reached an opinion as to the rate of deterioration of the Pickering Lumber Corporation saw logs in the deck above mentioned. The rate of deterioration is shown percentagewise on the attached schedule.

I show four causes of deterioration, namely, stain, decay, end checking, and brashness which are described in this order.

In stain, it is my experience and all other operators experience of which I am familiar, show con-

(Testimony of Frank Momeyer.)

clusively all the pine logs cut prior to July 7th, 1945, in the Stanislaus region, the Northern California region, or Eastern Oregon region, would incur all of the stain loss by April 7th, 1946.

The decay, it is a well known fact nearly all of the decay in logs that are decked, the logs are infested by bark needles, timber felled prior to July 7th, 1945, would be well infested by the following September, and rotting fungi would become well established with the entrance of the needle, very little rot would occur by April 1946. The decay then becomes progressively more pronounced and the progress of the decay is shown in the attached schedule which in my firm opinion is a fair statement of same.

Checking, the larger part of deterioration caused by end checking took place in the latter part of the period, the [11] amount of end checking varied with the size of the logs, the exposure, and the bark thickness, the distribution of the total loss of this nature is shown here based on my past experience on several operations.

Brashness, most of the losses caused by brashness will be found in the white fir, and vary with the number of hot and cold seasons. Some fir logs which is good since cutting, I would consider that no loss occurred in the white fir logs from this cause during the first nine months, but ten per cent in the next three months. There is a certain amount of brashness in all ponderosa and sugar pine logs, this

(Testimony of Frank Momeyer.)

usually shows up in checking particularly all the surfaces cutting this loss to the pine logs is included in the checking loss.

I have no data on losses resulting from age and in incensed cedar logs other than a firm conviction that approximately no loss in that species occurred in the first twelve months since the timber was cut.

Respectfully submitted, Thomas and Jackson, W. H. Thomas, attached is a percentagewise description of the findings.

(End of reading.)

Q. (By Mr. Whittaker): Mr. Momeyer, you received these reports? A. I did.

Q. Did you thereafter as auditor for the defendant company following the formula set forth in the findings of these reports [12] compute the amount on the checking, brashness, stain and rot loss to the logs in the deck that had been cut before the fire? A. I did.

Q. And what was that amount, approximately?

A. \$36,149.95.

Q. Where, in what schedule and what page of the proof of loss is that contained?

A. That is contained on page 17 of the proof of loss, schedule D8.

Q. And now, Mr. Momeyer, did you following the formula and findings of Mr. Moffitt, and Mr. Thomas' report, compute the stain rot, end checking and brashness, degraded, or depreciation on the five

(Testimony of Frank Momeyer.)

million eight hundred and forty-four thousand nine hundred and ten feet of logs cut after the fire?

A. I did.

Q. What was that amount? A. \$2,081.64.

Q. Was that carried to the schedule in the proof of loss as an expense of partial logging operations, and if so, what page of the proof of loss.

A. It was, and it will be found on page 22 of the proof of loss schedule IIIR4.

Q. And now, this is a summarization of the figures in respect to the partial log recovery, and the expenses in producing that gross recovery, you have testified that the total recovery was [13] \$5.31 on 11,301,877 feet of logs brought into the mill site after the fire, or \$60,125.18, have you not?

A. Yes, correct.

Q. And now, that was the gross amount with which this proof of loss credited the claim on account of recovered expenses, and continuing costs from partial logging operations, correct?

A. That is correct.

Q. And now, you have testified that you charged against that amount the excess log cost of \$3.60 per thousand comparison costs of the logs brought in after, as compared to the logs brought in before the fire, on 11,307,877 feet or \$40,715.40?

A. That is correct.

Q. Then this \$2,081.64 you have just testified to is the depreciation on those logs that had occurred after cut, after the fire, and then deducting also the

(Testimony of Frank Momeyer.)

\$12,692.35 you have testified to as extra decking expenses in decking logs in the decking yard at the mill site make a total deduction of \$55,269.39, does it not? A. That is correct.

Q. From the \$6,125.19, and the difference \$4,085.80? A. Correct.

Q. Which would be the net recovery from the partial logging operation? A. Correct.

Q. And now, Mr. Momeyer, we pass to another subject, the box [14] factory operation after the fire. The company, did it not, have a certain lumber on hand at the time of the fire? A. It did.

Q. Some of which was suitable for the manufacture of boxes? A. Yes.

Q. Some of which—that which was formerly known as box lumber? A. That is right.

Q. And now, had Pickering Lumber Corporation produced that lumber itself? A. It had.

Q. And for what purpose had it produced the so-called box lumber?

A. For the use in a box factory, produced box shook.

Q. Did it ever offer to sell that lumber as lumber? A. It did not.

Q. And, of course, didn't sell it as lumber?

A. No, sir.

Q. You ran it through the box factory?

A. That is right.

Q. And now, getting to the amount—just a moment, first I want to ask you—I believe this is cov-

(Testimony of Frank Momeyer.)

ered by the pleadings, but I want to cover it briefly, was it possible to buy box lumber at the time of or following the fire at O.P.A. ceiling prices? [15]

A. It was not possible.

Q. Did Pickering Lumber Corporation ever produce for sale, or offer to sell as far as you know, that type of lumber called box lumber?

A. We did not.

Q. And now, just as an aside, did you actually after the fire run through the box factory and produce there from into box shook certain grades of lumber, even higher grades than box lumber?

A. We did.

Q. And during the loss?

A. We did, yes, sir.

Q. And now, Mr. Momeyer, how much lumber as shown by your book was run through the box factory starting with July 8th, I realize you didn't get into the box factory for two or three days after?

A. That is right.

Q. Starting as soon as you did start the box factory after the fire, how much lumber was run through the box factory as box shook?

A. 8,828,644 feet.

Q. How much box shook in board feet did that produce?

A. 8,636,974.

Q. And now, Mr. Momeyer, in constituting the—may I ask you first, this box factory operation conducted after the fire, was [16] a partial operation the profits of which to be credited against the

(Testimony of Frank Momeyer.)

claim, and to be for the benefit of the insurance company, is that correct? A. That is correct.

Q. And now, in consulting your claim, the proof of loss, would you tell us how it was done?

A. We first took the cost of 8,828,644 feet of lumber, used in the box factory, that was \$39.86 per thousand feet, and to this added the cost of manufacture in the box factory, the work of processing the lumber through the box factory unit, that was \$11.65. Then we found shipping expenses \$11.65 per thousand.

Mr. Whittaker: I haven't been saying per thousand, it is pretty familiar to us.

The Court: I understand.

The Witness: \$11.65 per thousand feet cost of running it through the box factory, and the shipping expenses, \$.97 per thousand, and then because we didn't get the full 8,828,644 feet in shook, we had an under run of 191,670 feet to figure down to 8,636,974 produced in box shook, that cost \$1.03 per thousand more than the under run cost normally—normally it happens in a box factory you have an under run, the resawing and waste that occurs in developing box shook that adds up to a total then of \$53.51 per thousand to get the lumber through the box factory, and loaded on the car, and sold.

Q. (By Mr. Levitt): Pardon me, may I check one of those— [17] two of these figures, the total was— A. (Interrupting) \$53.51.

(Testimony of Frank Momeyer.)

Q. (By Mr. Levitt): And the shipping expenses were what?

A. The shipping expenses alone?

Q. You said you took the items, and adding the cost of manufacture, you had another item of shipping expense.

The Court: \$.79 per thousand for shipping, loading in the cars.

Mr. Levitt: Then you had an under run \$1.03 and a total of——

A. (Interrupting) \$53.51, if I correctly quoted the figures here.

Q. (By Mr. Whittaker): What was the actual receipt for that lumber as sold per thousand foot?

A. \$60.22 per thousand.

Q. The difference between the \$60.22, the selling price received, and the \$53.51, is \$6.71, is that right?

A. That is right.

Q. \$6.00 times 8,828,644, is \$59,240.93, is it not?

A. That is right.

The Court: What was that last figure?

Mr. Levitt: Er——

Mr. Whittaker: \$59,240.93.

Q. (By Mr. Whittaker): And that is the amount of recovery from the box factory operation, shown in what schedule of the [18] claim of the proof of loss, Mr. Momeyer?

A. It is summarized on page 20 of the proof of loss, schedule R3II, and then on page 21 the details that make up the \$59,000.00 as given under R2III.

(Testimony of Frank Momeyer.)

Q. And now, Mr. Momeyer, following the operation through very briefly, the skeleton—I can do it some other way for my purposes—the lumber at the end of the green chain, which is the green sorter behind the mill, after the lumber comes to the mill, being diverted at that point to the manufacturer of box shook, or channeled into any avenue that takes it to the planing mill for finish and sale, as lumber, would it be true the cost for producing that lumber to the end of the green chain would be the same in either case——

Mr. Levitt: (Interrupting) Just a moment, counsel, you are talking about the same piece of lumber in the green chain asking whether the cost of, up to the point would be the same whether you moved or left it in the planing mill, or right in the box factory——

Mr. Whittaker: (Interrupting) Whether every piece of lumber up to that point cost you exactly the same per foot.

Mr. Levitt: Whether you moved it or left it right there—I will object to the question on the grounds it is argumentative and calling for the conclusion of the witness, it is so obvious a piece of lumber is produced, your Honor, if the cost at that point doesn't—whether he intends to move it left or right, obviously that is what the question means.

The Court: It seems that way to me, I will allow it to be answered. I am not certain on the argument.

Mr. Levitt: Is that what the question means?

(Testimony of Frank Momeyer.)

Mr. Whittaker: That is exactly what it means, I think I shall withdraw it, the man is obviously not an expert.

Q. (By Mr. Whittaker): And now——

The Court: (Interrupting) One piece of lumber might cost more than another piece.

Mr. Levitt: That is another question.

Q. (By Mr. Whittaker): Mr. Momeyer, did Pickering Lumber Corporation have any subsidiary corporation that own anyone of these functions up there, or was it all owned and operated by one corporation, Pickering Lumber Corporation, the defendant?

A. All owned and operated as one unit, Pickering Lumber Corporation, the logs, sawmill, complete operation under one ownership.

Q. I think I neglected in our examination yesterday, to ask you why it was you said that normally your logging operations begin before April 15th to May 1st, and continue to about November 30th, I believe you said—why is that, was that your answer?

A. Our timber supply is located in the High Sierras, and during the winter months it is impossible for us to conduct logging operations because of snow and general winter conditions, therefore, we are shut down until—shut down in the fall about November 30th, and cannot start again [20] operating until around April 15th or May 1st.

Q. Getting back to the box factory operation for

(Testimony of Frank Momeyer.)

a minute, were you able to continue even though you used some higher grade of lumber in the manufacture of box shook, in the box factory operation at the end of the nine months loss period of April 7th, 1946?

A. Not quite. We had lumber to run until March 16th, 1946.

Q. What do you mean, we had lumber to run, you ran out of lumber?

A. We ran out of lumber at that time and had to shut the box factory down.

Q. By the way, in referring to this long depreciation did you invite the plaintiff insurer to participate in these tests that were made to determine the extent and period of the occurrence of depreciation?

Mr. Levitt: I object to the question on the grounds it is irrelevant, and incompetent, counsel is attempting to prove what these experts found in a sense, whether correct or not, he isn't raising the particular point as to their correctness—it is not involved in the issues of this case, could only be a relevant admission of the insurer with regard to correctness of these things, and even at that it would be very weak on that point, I am not sure it would be an admission if they were correct, the insurance company is under no obligation.

The Court: I think I will let the question be asked. [21]

The Witness: We did invite the insurance company to come up while the test was being made, and

(Testimony of Frank Momeyer.)

participate in it, and watch the work that was being done.

Q. (By Mr. Whittaker): Did they do it?

A. They did not.

Q. Did they advise you why?

A. They said they were not interested.

Mr. Levitt: Just a moment——

Mr. Whittaker: (Interrupting) That is right, I will withdraw it.

The Court: The answer will go out—his answer to the last question.

Mr. Whittaker: Mr. Clerk, will you please mark this as Exhibit 3.

(The Clerk marks specified document Exhibit 3.)

Q. (By Mr. Whittaker): Did the auditors and accountants for plaintiff's insurance company have access to actually examine the books of the Pickering Lumber Corporation April 1st?

A. They did.

Q. Mr. Momeyer, I hand you what has been identified as Defendant's Exhibit 3, and ask you if you can state what that is?

The Court: Have we got that——

The Clerk: (Interrupting) Just for identification.

The Witness: This is a memoranda to the appraisers written by Mr. K. W. Whitters and Mr. W. M. Ball, adjustors for [22] the insurance com-

(Testimony of Frank Momeyer.)

pany, and pertaining to the appraisal under the policies that Pickering held.

Mr. Whittaker: I will offer this in evidence as Defendant's Exhibit 3.

Mr. Levitt: May it please the Court, I don't have any particular objection to the offering, but I don't quite see how counsel can offer it through this witness, I assume you are intending to show that a copy of the memoranda was submitted — Mr. Momeyer testified was submitted to the appraisers in the course of the award, and a copy was sent to Pickering, is that correct?

The Court: Not only for that purpose, also showed content and instructions.

Mr. Whittaker: That is exactly correct.

Mr. Levitt: I am not speaking of the purpose, I want to be clear to the scope of identification.

Q. (By Mr. Whittaker): Was this memoranda or a counterpart of it delivered to the appraisers?

A. It was.

Q. This, of course, was the same Mr. W. C. Whitters and W. M.——

Mr. Levitt: (Interrupting) We will stipulate Mr. Whitters represented the insurance company in the course of the adjustment.

Mr. Whittaker: And Mr. Ball likewise?

Mr. Levitt: Mr. Ball was acting with him. [23]

Mr. Whittaker: That will be all, you may cross-examine.

(Testimony of Frank Momeyer.)

The Court: We will take a short recess for five minutes.

Certificate of Reporter

I (we), Official Reporter(s) and Official Reporter(s) pro tem, certify that the foregoing transcript of 24 pages is a true and correct transcript of the matter therein contained as reported by me (us) and thereafter reduced to typewriting, to the best of my (our) ability.

/s/ GEORGE WHEELER,
By /s/ ELDON W. RICH.

[Endorsed]: Filed March 6, 1950.

Cross-Examination

By Mr. Levitt:

Q. Mr. Momyer, I take it that in your position as treasurer, you are quite familiar with accounting and accounting principles and so forth, are you not?

A. Well, I deal with them at considerable length.

Q. Have you had any accounting training?

A. Yes, sir.

Q. Have you ever practiced as an accountant?

A. I worked for a short time with a public accounting firm, in my younger days.

Q. And then you are familiar, are you not, with accounting principles and practices, in general, as

(Testimony of Frank Momeyer.)

well as in the lumber business in particular, isn't that so? A. I think so.

Q. Now, did you prepare this claim that has been introduced in evidence in the form of a proof of loss—may I have the pleadings for a moment? I didn't hear your answer if you did answer.

A. I made the preliminary claim, and when it became evident that we had to file a proof of loss we asked our public accountants Robinson & Nowell & Company to prepare the claim in its final form.

Q. Robinson & Nowell & Company were the regular C.P.A.'s firm that the Pickering Lumber Company had used for many years, were they not?

A. That is correct. [2]

Q. So that the testimony that you gave with regard to items shown in the proof of loss, which is Plaintiff's Exhibit D, was based primarily upon the fact you found the report of Robinson & Nowell to be correct, is that so?

A. That is so, it agreed with the preliminary report that we made—in general.

Q. With regard to this memorandum, do the appraisers that you spoke about, or identified as having been filed by Mr. Withers—did the Pickering Lumber Company file any reply to that memorandum?

A. Not a reply, they did file with the appraisers the brief—I believe Judge Barnett filed a brief.

Q. That brief, as a matter of fact—however, was

(Testimony of Frank Momeyer.)

filed before this memorandum of Mr. Withers, was it not?

A. I am not sure as to the timing because they were both filed with the appraisers—when they received them I do not know.

Q. In order to refresh your recollection, I call your attention to the last portion of the first paragraph of Defendant's Exhibit No. 3, which you have just identified, that memorandum that Mr. Withers filed with the appraisers—

A. (Interrupting) Which is undated.

Q. As is the brief that Pickering filed also. I read a sentence—"We therefore request that the appraisers consider the briefs by Mr. Paul Barnett and Harrington, attorneys for Pickering Lumber Corporation, which may or may not assist in the [3] arriving at the value of the loss." I will ask you if that refreshes your recollection as to whether or not the brief that you spoke about having been filed by Pickering was filed before or after this memorandum which you identified.

A. I would say from the reading of that memorandum it would appear it was.

Q. It was filed before?

A. It was filed before, I do not know that, I didn't have the documents.

Q. As a matter of fact, these briefs were both filed after the hearings of the appraisals were concluded, isn't that correct?

A. I believe that is correct.

(Testimony of Frank Momeyer.)

Q. So far as you know, the only presentation made to the appraisers by Pickering Lumber was after the hearing—was the one legal brief that is referred to in Defendant's Exhibit 3, isn't that so?

A. Until late in the appraisal work, that the appraisers were doing, I believe that they did finally ask for some further information which we gave them.

Q. Outside of furnishing some additional facts with respect to figures, there was no other statement or brief filed on behalf of Pickering Lumber, other than the single brief referred to in Mr. Withers' memoranda, isn't that so?

A. That is true.

Q. Now, Mr. Momyer, I am going to show you a letter which [4] appears to bear your signature, dated October 10, 1945, addressed to the Fire Companies Adjustment Bureau, on the letterhead of the Pickering Lumber Corporation, to which is attached several mimeographed sheets, five to be exact, and ask you if you can identify this as a letter which you wrote, and sent to Mr. Withers of the Fire Companies Adjustment Bureau, on or about that date.

The Court: What was that date again?

Mr. Levitt: October 10, 1945.

A. I think that is true, this letter is not regarding new period and old period insurance.

Mr. Levit: I will ask the Court to ask the witness to confine his answers to the questions. You do identify that as a letter you wrote?

(Testimony of Frank Momeyer.)

A. That is right.

Q. I may say primarily—I will ask one more question. The fire that is referred to in that letter is the same fire we are talking about, involved in this case, is it not? A. That is right.

Mr. Levit: We offer this letter in evidence with the attachment referred to in the letter and ask that it be marked Plaintiff's Exhibit next in order.

Mr. Whittaker: The purpose is not clear to me; if it relates to a fire claim under fire insurance policy I would inquire what is the purpose, to know whether or not it has any relevancy. [5]

(Thereupon followed a short argument by Mr. Levit.)

The Court: I will admit it.

Mr. Levit: That will be Plaintiff's Exhibit I.

Q. Now, Mr. Momeyer, it is a fact, isn't it, that Pickering Lumber Corporation had certain policies of insurance, which covered the physical loss to certain lumber which had been destroyed in the fire——

The Court: (Interrupting) Is that Plaintiff's Exhibit I?

The Clerk: That is right.

Q. (By Mr. Levit): It is also true, is it not, that Mr. Withers on the part of Pacific Coast Adjustment Bureau—his name is not mentioned, Mr. Ball's name is mentioned, Mr. Ball and Mr. Withers of the Fire Companies Adjustment Bureau, were adjusting that loss on that insurance, isn't that so?

(Testimony of Frank Momeyer.)

A. They were.

Q. And of course in arriving at the amount due under that insurance, it was necessary to ascertain, was it not, the appropriate price or value to be placed upon the lumber that was destroyed?

A. For those policies, yes, the value of the lumber was concerned.

Q. Now, I will read the letter, if the Court please. It is very short.

“Fire Companies Adjustment Bureau, Inc., 300 Montgomery Street, San Francisco, California, Attention: Mr. W. Ball. [6]

“Dear Sir:

“We are attaching hereto two copies of a statement showing a stock loss of \$3,544.74, as a result of the sawmill fire on July 7, 1945.

“We believe this statement is self-explanatory, but if there is anything that is not clear we will be glad to give you further information upon request.

“Yours very truly,

“Pickering Lumber Corporation

“By F. F. Momyer.”

Attached to that is a mimeographed statement, the first page of which is headed Recapitulation Insurance Declaration Values, and then following a listing by footage and by price of the lumber in the green chain and of the lumber inventory reconstructed.

Now, I would like to ask you, Mr. Momyer,

(Testimony of Frank Momeyer.)

whether or not all of the lumber lost in that fire was on the green chain, or whether some of it was in inventory.

A. All of it was on the green chain.

Q. It was necessary, however, in order to arrive at your figures to bring into calculation the lumber in inventory?

A. I don't think—we make an inventory statement at the end of each month, and that was probably submitted along with this.

Q. Well, the reason I asked you—you notice page 1 headed Recapitulation which is attached to your letter, deals not only [7] with the green chain lumber but also with the inventory.

A. Well, this was an insurance declaration on all of the lumber we had on hand, and might have been for the purpose of determining any company's insurance in excess of the other's claim.

Q. Now, in valuing the lumber in that declaration, of course it was necessary to state—for you to state its true value or the value in place, was it not?

A. We submitted nothing to the insurance company except a value of \$2,500,000 — or \$2,000,000, whatever it might be, and in our calculations in arriving at that amount we do have to use some basis for it.

Q. That basis you used was the market value, or the value in place, is it? A. That is right.

Q. Actually you determined that market value, and the value in place on the basis of the O.P.A.'s price, do you not?

(Testimony of Frank Momeyer.)

Mr. Whittaker: Just a moment. I will object to the question as calling for a conclusion, and as opposed to the law——

Mr. Levit: (Interrupting) Never mind the law. We are talking about an admission made by the defendant.

Now as to the value of the lumber——

The Court (Interrupting): I will allow the question to be answered.

A. At that time, at the time the fire occurred we did use that basis because we had no other basis. [8]

Q. (By Mr. Levit): Now, pardon me, I would like to pursue that a little further. You mean prior to the fire you didn't have the figures on which to determine the average cost of all lumber produced by the mill?

A. We are not talking about average costs here.

Q. You said you had no other basis for determining a valuation.

A. Valuation is correct; under the fire policies we needed to determine valuation of physical property loss; in U. and O. insurance we talk about the profit.

Q. We won't argue that, but the fact of the matter is you did have not only the OPA's price available at the time you were computing this figure, you had your average cost figure available, did you not? It was also available?

A. They were available, but not concerned in the computation.

(Testimony of Frank Momyer.)

Q. Now, Exhibit A attached to Plaintiff's Exhibit I is also entitled a Recapitulation of Stock on Green Chain as of 5:00 p.m. July 7, 1945, that is the date of the fire, wasn't it?

A. That is right.

Q. And I will call your attention to these figures showing the footage, as showing the values, and I will ask you if it is not a fact that those figures were made on the basis of OPA's price.

A. They are, less incurred expenses of moving the lumber from the green chain to the shipping dock.

Q. Now, I will call your attention also to the fact it says at about the middle of the page At Estimated Freight Differential [9] Gain Pine only so many feet at 69 cents. You notice that?

A. That is right.

Q. Now, that represented, that 69 cents represented, did it not, Mr. Momyer, the freight differential on an average which the Pickering Lumber Company made or anticipated to make on the sale of lumber, under the OPA?

A. That is right; the OPA regularly allowed the freight difference.

Q. In other words, what that means is that this shipping of the lumber away, you priced f.o.b. on the OPA basis, f.o.b. a certain point, and therefore if you were shipping a greater distance than average you would make the freight differential——

A. (Interrupting): That is right.

(Testimony of Frank Momyer.)

Q. What you made was 69 cents, wasn't it?

A. On this particular number I believe that is correct.

Q. By the way, do you know how much the award allowed for freight differential?

A. No, I do not.

Q. Following the line about the freight differential, I call your attention to a statement less deductions for in place value, and then follows a list of certain costs and so forth, and I ask you again if it is not true that in place values were calculated by Pickering Lumber Corporation at the OPA price.

A. That is right.

Q. Now, at the bottom of that page, I read to you this [10] statement, "Items priced on current rough f.o.b. mill prices plus estimated freight gains in same manner as regular monthly inventory pricing." That is a correct statement, isn't it?

A. That is correct.

Q. And when you referred to rough f.o.b. mill prices you are referring to OPA prices, aren't you, the ceiling price fixed by OPA?

A. At the time that that statement was made, yes, sir.

Q. As a matter of fact, the statement is correct also in regard to its stating that that was your basis at that time, and had been your practice of pricing your regular inventory in the yard.

A. Under these fire insurance policies.

Q. Pardon me, you misunderstood my question.

(Testimony of Frank Momyer.)

I wasn't referring to the fire insurance policies at all. I am asking is it not a correct statement here that these prices, these values stated here were calculated in the same manner you calculated the values in your own inventory every month, isn't that so? A. That is not correct.

Q. That is not correct? A. It is not.

Q. How did you value your inventory?

A. On our cost basis, and our books—this statement is made particularly for insurance purposes and deals with values, not costs. [11]

Q. Isn't it a fact, I want to be clear with you, Mr. Momyer, that when I talk about cost basis or when you talk about cost basis, we are going to clarify one point—when you mentioned cost basis you meant average cost, didn't you?

A. Yes.

Q. Now, then,—

A. (Interrupting): Actual cost if you want to call it that.

Q. As an accountant, you have heard the expression allocated cost, haven't you?

A. I have.

Q. So that I think—in order to be perfectly clear, when you are referring to an average cost, please say so and I will do the same. We won't just talk about a cost basis.

A. Neither average cost or allocated cost has anything to do with the subject we are talking about now.

(Testimony of Frank Momyer.)

Q. That may or may not be true. As I understand your testimony now to be that Pickering's books—prices this inventory, the inventory so far as the books were concerned, and values them on an average cost basis.

A. That is right, until the end of the year when we make a computation for income tax purposes, because we are forced to do so, for the Revenue Department we adjust our books to reflect that difference, our books each month showed on an average cost.

Q. In other words, it is true, is it not, some months—in fact, some years before the fire you were required by the Internal [12] Revenue Department to place your inventory on an allocated cost rather than an average cost basis?

A. For income tax purposes, about 1943, I think it was.

Q. Will you then explain to me why, if you did not regularly price your inventory at OPA prices, plus 69 cents freight differential, why you made that statement in this Exhibit A which I just read to you. "Items are priced on current rough f.o.b. mill prices plus estimated freight gain in the same manner as regular monthly inventory pricing."

A. That has nothing to do with the question you asked me. You asked me if we carried inventory on the books, on OPA price basis. We do not, this statement is made for insurance coverage purposes on our stock and therefore is so priced at the value

(Testimony of Frank Momyer.)

of lumber, but we make no entry in our books to reflect this price at all at any time—this is purely an insurance coverage statement.

Q. What do you mean, same manner as the regular monthly inventory price?

A. Regular monthly inventory price for this insurance purpose, for these policies—in other words, the loss we claimed under these policies was computed on the same basis we reported each month to the insurance company for value purposes.

Q. In other words, then, so far as the calculated in place values are concerned, you always use OPA prices for insurance purposes and your purposes, didn't you? [13]

A. Not for inventory purposes or cost purposes.

Q. It is your testimony you did not use OPA prices in your accounts for company's purpose at all?

A. Except on a computation we make for management information regarding the box factory and that is washed out in our profit and loss statement, it is purely information.

Q. We will come back to that. It is in fact, is it not, that the books do show then the in place value when you calculate the profits of the box factory, show the in place value of the lumber at OPA prices, right?

A. For that supplemental statement, yes, sir.

Q. Now, continuing with this Exhibit A and coming to the table which is listed here of the stock

(Testimony of Frank Momyer.)

on the green chain, this I take it is the breakdown of what we have just been talking about, showing each grade with OPA ceiling price, the number of feet and figures to show the value, is that right?

A. That is correct.

Q. No, in each case the value that you stated in that third column is obtained by multiplying the number of feet by the OPA price, isn't it?

A. That is correct.

Q. I am going to call your attention to certain items on there, look at No. 3 on page 3—I have numbered those pages in pencil at the bottom, that is the third one.

Mr. Whittaker: This is still Exhibit I? [14]

Mr. Levit: Yes—page 3, item 3, have you got that—600 feet?

A. Yes.

Q. Is that box lumber? A. I think so.

Q. The ceiling price is \$27.50, isn't it?

A. That is right.

Q. Look at item 4, the following item, is that box lumber? A. I think so.

Q. And the price, the ceiling price is \$31.25, shown there, isn't it? A. That is right.

Q. Item 7, is that box lumber?

A. I think so.

Q. And so, if we follow right down there—this exhibit, and take all of the items that have types of grading after them which, as you say, indicates that is box lumber, we find that the price shown, the

(Testimony of Frank Momyer.)

OPA price shown, runs from \$27.50 up to and stopping of \$31.25, don't they?

A. I think so, there is no question about that on this particular lumber.

Q. It is also true, isn't it, that many of the items on those sheets, that show a lower ceiling price than that, in other words, some of them go much lower than that, don't they? A. Yes. [15]

Q. And of course in your high grade they run as high as \$81 a thousand feet, correct?

A. I see an item of 81, I am not sure that is the highest one, I expect it is.

Mr. Whittaker: In that respect you are not talking about high grade box lumber.

Mr. Levit: I am talking about lumber above \$81.

Q. (By Mr. Levit): Now, Mr. Momyer, I will show you a letter dated October 11, 1949, also addressed to the Fire Company Adjustment Bureau, this time to the attention of Mr. Withers, in which reference is made to certain attachments or certain exhibits which pages I have numbered 7, 8, 9 and 10—in other words, I have numbered them consecutively as I did with that letter of October 10. I will ask you if you can identify this letter as one that you wrote, and the attachment as those that were attached to that letter, when it was sent.

A. Yes, I remember this letter.

Q. And that letter, like the previous exhibit, was written, was it not, in connection with the loss

(Testimony of Frank Momyer.)

of lumber arising in the same fire we are talking about?

A. Yes, the property damage fire—loss of U. and O.

Mr. Levit: We offer this as Plaintiff's Exhibit J.

Mr. Whittaker: Your Honor, we will make the same objection as before, I think they are not germane, there are a number of such letters, and as to any issue here, it seems to me that they [16] seek to invade and include the very question Your Honor will ultimately be called upon to decide, it seems to me it is a question of whether the OPA price used by the appraisers is a proper price—not a matter of law—whether some other price might have been appropriate, the question is whether or not there was an error of law made by the appraisers beyond their jurisdiction—

(Thereupon an argument was made by Mr. Levit.)

The Court: I will allow the question.

Mr. Levit: Now, I will read the letter to Mr. Withers written the day following the previous letter.

“Dear Mr. Withers:

“We are attaching hereto a statement showing the total footage and the ‘in place’ value of our lumber inventory as of July 7, 1945, the date of the loss of our sawmill by fire.

(Testimony of Frank Momyer.)

“You will note that we have started at the estimated rough market value of this lumber, f.o.b. cars and from this amount we have deducted unincurred expenses, such as shipping and selling costs and estimated overhead, handling costs, et cetera, to arrive at the estimated net ‘in place’ value of the lumber at the time of the fire. I believe that ample footnotes have been made, so that you can check our method of arriving at the ‘in place’ values, et cetera, however, if you have any questions regarding our calculations, we will, of course, be glad to give you further information [17] upon request.”

Q. Now, Mr. Momyer, these in place values that you speak of there were computed, were they not, throughout the exhibit which is attached to this letter, on the basis of an OPA ceiling price?

A. That is right.

Q. That was the way that you made your calculations, with respect to the entire inventory of lumber that had gone through the box factory, that had gone through the sawmill and that was on hand at the time of the fire, on July 7?

A. Yes, that computation was not made for U. and O. claims, however.

Q. We understand that, but the fact is those prices in your opinion did represent the in place value of the lumber at that time, isn't that so?

A. They represented the only basis we knew

(Testimony of Frank Momyer.)

how to put on them for the purpose of physical property loss.

Q. Mr. Momyer, you did not in your letter tell the insurance company that these figures might not be the in place value, you said these are the in place values, did you not?

A. On the basis calculated.

Q. You believed them to be in the in place value at that time, didn't you?

A. I think so, for this purpose.

Q. And you say for this purpose, you are referring to the mere [18] purpose of adjustment of the physical loss on lumber?

A. Yes.

Q. Isn't it a fact you used exactly the same basis to determine in place value and to determine market value, and in calculations made in connection with determining the profit of the box factory?

A. No, we made a supplemental statement, as I explained to you before, for management purposes, and when we go into our profit and loss statement whether it be auditors or our own accountants, we go to the profit and loss statement and take off the difference between the sales price and the cost, and arrive at the profit, and we pay no attention to the in place value.

Q. I think we will come to that later. Now, then, the calculating the value of your inventory, you end up with what you call on this statement, an estimated net in place value, is that correct?

A. That is right.

(Testimony of Frank Momyer.)

Q. And this estimated net in place value, so that we will be perfectly clear, is based upon the OPA ceiling price, isn't it? A. That is right.

Q. That goes for all of the lumber that you had on hand, your entire lumber inventory, is that right?

A. For the purpose of this insurance policy, yes.

Q. Incidentally, will you show me in this exhibit, or in the [19] prior Exhibit I, any place where you told the insurance company that these values on which you expected them to adjust the loss were merely calculated for the purpose of adjustment and did not represent its true value.

A. I have nothing on this statement to that effect, the physical property insurance policy required we submit a value statement, and we had to submit something.

Q. You didn't qualify it in the submission, did you? A. We had no reason to.

Q. Again on this exhibit, I call your attention to the fact that you have placed a note, at estimated freight differential again on 11 million-odd feet of lumber, at 69 cents, you see that?

A. I think that is right.

Q. And that was then over your entire inventory, by and large, with the exception of perhaps two million feet, what you calculated to be your average freight differential again?

A. Yes, because we shipped a lot of lumber to the East, a higher grade lumber to the East, and

(Testimony of Frank Momyer.)

a lot of that—we have very little gain—freight gain.

The Court: That is the same 11 million feet as testified to before?

A. No.

Q. (By Mr. Levit): Let's be sure about that, I am not sure myself—this inventory shows a total footage off hand of 13,900,000 feet, doesn't it? [20]

A. That is right.

Q. That was of July 7, wasn't it?

A. I think so.

Q. That is what you had on hand at the time of the fire, isn't it?

The Court: 14,000,000 feet?

A. I call your attention to the fact that sixteen million—753 total——

Q. (By Mr. Levit, interrupting): Just a moment. We will get this straight in a moment—then you also had some additional lumber which you called plant lumber, which brought it up to sixteen million some-odd feet?

A. That is right.

Q. The lumber you had on hand at the time of the fire is correctly shown in this inventory, isn't it?

A. I think so.

Q. The 11,000,000 feet, if I am not mistaken, was logs, wasn't it?

Mr. Whittaker: That is correct, 11 million some odd feet of logs brought in after the fire.

(Testimony of Frank Momyer.)

The Court: 11 million feet altogether brought into the mill after the fire?

Mr. Levit: —(Thereupon a statement by Mr. Levit was given to the Court.)

Q. (By Mr. Levit): Now, just—I don't think it is important, [21] but just to clarify, if you can, where did the figure of 11,800,000 come from—we are talking about freight differential at 69 cents.

A. Some of it, you wouldn't make any freight gain on at all.

Q. Which you eliminated from these last two items?

A. We wouldn't have anything to sell—it is 2,800,000, this would be used elsewhere—we figured we would sell the 11,000,000 feet on the market.

Q. Now, you came out in this statement with an estimated net in place value of \$34.43 per thousand, did you not?

A. Well, we came out with that, yes, that is the figure.

Q. And of course, that is over all grades, isn't it?

A. That is right.

Q. Highest to the lowest, then you made certain adjustments for your plant use lumber, cash discount, and for your D grade estimate and waste estimate, you came out with a final net in place value of \$30.83 per thousand, over all, didn't you?

A. That is right.

Q. Suppose you hold this exhibit a minute, I want to refer to my notes. Now, in footnote B on

(Testimony of Frank Momyer.)

that same page—the first page attached to Exhibit J, you make the statement, priced at rough f.o.b. mill price, correct? A. That is correct.

Q. Those are OPA prices, aren't they?

A. Yes, sir. [22]

Q. You have reference to? A. Yes, sir.

Q. In footnote D you speak of freight differential, right? A. Yes, sir.

Q. And you say—may I see that a moment—and you say current pine ceiling permits computation of delivered prices to California destinations on Susanville, California, rates of freight. This freight differential gain has been averaged and so forth and applied to this inventory valuation as shown that figure, the average was that 69 cents we have referred to, wasn't it?

A. That is right.

Q. Now, I would also at that point like to read to the Court the first paragraph on page 7, page number 7 of the attachment to Exhibit J, top of page No. 1-A.

“Our fir is sold under Douglas fir ceiling no. 26 prices permitting us to compute delivered prices to California destinations only, on a Portland rate of freight. Average freight differential gain on all fir lumber shipment has been added to inventory valuation of fir lumber items, we ship to California destinations and average f.o.b. mill realization of fir lumber items we ship outside the State of California and so on.”

(Testimony of Frank Momyer.)

Now, again on this next page which is No. 8 at the bottom, we come to your lumber inventory—a statement of your lumber inventory by grade as of July 7, 1945. Now, that doesn't give [23] the price per thousand feet, but it does again show at the bottom an additional estimated freight differential gain of 69 cents, doesn't it?

A. I think so.

Q. I will call the Court's attention to the fact on Schedule A of the inventory page 9 of this exhibit at the bottom is the footnote.

“Above estimated shipping and selling costs based on our experience for the fiscal year April 1, 1944, to March 31, 1949.”

Your fiscal year, Mr. Momyer—Pickering's fiscal year ended March 31, didn't it?

A. That is right.

Q. And that was agreed, was it not, in the adjustment of the U. and O. loss, that the experience of the year—the fiscal year ending March 31, 1945, would be used as the base year for the purpose of calculating the use and occupancy loss.

A. I believe that was agreed by all parties.

Q. And then the final page, which is No. 10 of this exhibit, speaking of certain additions to the valuation for the surface stock in the inventory—I assume—I will ask you, rather, I shouldn't say assume, I don't know. Is it a fact that this surface stock refers to stock run through the planing mill?

A. That is right.

(Testimony of Frank Momyer.)

The Court: Mr. Levitt, it is 12:00 o'clock and we will now [24] take the noonday adjournment until 2:00 o'clock this afternoon.

(The noon recess was taken until 2:00 o'clock P.M.) [24-A]

Afternoon Session, Wednesday, June 9, 1949, 2:00

By Mr. Levitt:

Q. Now, Mr. Momyer, before we get too far away from your testimony on direct examination, I should like to ask you, having it in mind—whether it is not a fact that all of the points and arguments that were brought out in connection with these various items on your direct questioning by Mr. Whittaker were also brought out in the appraisal, and were presented by your company, or by yourself to the appraisers.

A. I am not sure that all of them were, I think substantially that they were.

Q. Do you recall any matter of fact that you testified to this morning that was not presented to the appraisers, or yesterday?

A. I can't say that I do.

Q. Now, I am going to show you a letter dated July 1, 1946, on the stationery of the Pickering Lumber Company addressed to Mr. Withers, and signed by yourself for Pickering, making reference to a tentative business interruption claim to which are attached certain documents, referred to in the

(Testimony of Frank Momyer.)

letter as schedules, and I will ask you if you wrote that letter and sent those inclosures to Mr. Withers, at about that date.

A. Yes, sir, I did.

Mr. Levit: We will offer this letter in evidence and ask that it be marked Plaintiff's Exhibit K.

The Clerk: Plaintiff's Exhibit K. [25]

Mr. Levit: The letter K—Exhibit K will include the letter and the documents attached which have been identified by the witness, will you clip them together—I should say that there are on these attached pages certain pencil notations which I do not intend to offer, I have no idea who made them, but I am not introducing the pencil marks.

The Court: The document exclusive of the pencil markings.

Mr. Levit: "Dear Mr. Withers:

"In accordance with your request, we are attaching hereto our tentative business interruption claim resulting from the loss of our sawmill by fire on July 7, 1945. This claim has been prepared by Robinson, Nowell & Company, and is made up of the following schedules: No. 1, summary of all items included in our tentative claim, 824-some-odd dollars. Certain comments regarding the general construction of our claim are also included in this schedule.

"2. Net profits presented in 266,047.31. The basis for the calculations used in this schedule are explained in general in the summary schedule 1 re-

(Testimony of Frank Momyer.)

ferred to above. You will note that Robinson, Nowell & Company have shown lumber sales and box shook sales separately in their schedule. However, we do not on our books make any attempt to show actual profit from any particular department of our operations. We consider that our plant, logging operations, et cetera, are all one integrated operation and we are interested in the overall [26] profit from the entire operation. This is the basis on which our insurance coverage was placed.

“No. 3. Expediting an Extraordinary Cost. \$21,648.10. Comments regarding this schedule are also included in the summary schedule 1 referred to above. We note that Robinson, Nowell & Company have not considered items applying to this schedule for the period of April 1 to April 7, 1946, inclusive. According to our records, this would add about \$448.82 to our tentative claim.

“No. 4. Depreciation. \$231,506.46. This amount represents the continuing depreciation claimed for 75 per cent of the 365 days following the fire and we believe the schedule presented is self-explanatory.

“No. 5. Overhead, Continuing Costs, Etc. \$305,763.66. We believe this schedule is presented in sufficient detail to enable you to check all of the items making up the \$305,763.66. We call your attention to the comment that is made by Robinson, Nowell & Company in their summary schedule 1 referred to above.

(Testimony of Frank Momyer.)

“It is our understanding that this tentative claim is being submitted without prejudice and that we may thereafter make such revisions, additions, or adjustments, that we believe to be in order. We believe this is in accordance with our agreement with you when you were in our office during the early part of June, and discussed with us the presentation [27] of our claim, et cetera. We have not included in our tentative claim any schedule of partial operations because we do not at this time know what dollar value should be assigned to the liability that you may have for the replacement of our inventory of raw stock used in the box factory during the period of July 1, 1945, to March 26, 1946. Likewise, we do not know the dollar value that should be assigned to the sustained loss on logs that were in the pond or on the ground in the woods at the time of the sawmill fire. We do not believe, however, that the amount of our claim will be materially affected when all of these factors are considered.”

Q. (By Mr. Levit): Now, Mr. Momyer, you submitted the letter and these figures, did you not, in presentation of Pickering's claim under policies that are here in suit? A. That is right.

Q. I call your attention to the statement 1 of the statement which I just read, “We have not included in our tentative claim any schedule for partial operations because we do not at this time know what dollar value should be assigned to the liability

(Testimony of Frank Momyer.)

that you may have for the replacement of our inventory of raw stock used in the box factory during the period July 8, 1945, to March 6, 1946, do you recall so stating in this letter?

A. That is right.

Q. That has reference, does it not, to the ascertainment of the [28] profit on the box factory operation?

A. That is right.

Q. The post-fire operation?

A. It has particular reference to inventory we felt we should not have to use in this partial operation because it could not be replaced. From the very beginning we discussed the possibility of using lumber we had on hand that belonged to us, and could not be purchased on the market. We saw it wouldn't be fair for us to use all of this lumber up and have to shut our box factory down, and would be unable to operate at the time the sawmill started, we wouldn't have any lumber on hand. The adjuster at that time mentioned inventory replacement—would allow us inventory replacement. We used 8,826,000 feet of lumber for boxes, and I believe it was our understanding we would be allowed credit for some of that footage, on the theory we should be allowed that lumber to start our box factory again, when the sawmill resumed operation. No one ever told us what was meant by inventory replacements in dollars and cents. We do have a basis on which to make such a calculation, since our claim for the 9 per cent—or \$842,000, and the insur-

(Testimony of Frank Momyer.)

ance was \$641,000, it seemed unimportant to this tentative claim, therefore we put in nothing for it but stated some calculations would need to be paid eventually, if a subsequent adjustment was found to be in order.

Q. As a matter of fact, as far as that claim was concerned, you [29] didn't put in anything for the salvage of the profit on the box factory operations at all, did you?

A. We couldn't at that time, determine definitely what it was, as I recall. That would be part of the salvage, and we couldn't determine that then—we could not determine the true salvage that would be allowed for the box factory operations.

Q. As a matter of fact, you filed your proof of loss, Mr. Momyer, did you not, and calculated the box factory profit, put in the entire eight million odd feet of lumber—it went through there?

A. We took back credit for about \$16,000.

Q. About two million feet?

A. About two million, I have it here as 2,720,000 feet.

Q. The company conceded that figure, did they not, the two million feet you were entitled to to get the box factory started again?

A. I do not believe that they did concede it, as said before, they did not give us any formula by which such calculations could be made. We made our own calculations—and I think they made one of their own also, on a different footage basis. [30]

(Testimony of Frank Momyer.)

Q. And now, that is, of course, not involved in the question of box factory profit we are discussing here, is it?

A. Only to the extent that it in effect reduces that profit, because you wouldn't be considering as much footage as we have talked about heretofore.

Q. And that reduction of the profit when taken into consideration by the appraisers and allowed in the award, wasn't it?

A. Yes, not in the dollars amount as stated here in the proof of loss, but they did take that into consideration, the inventory replacement, and allowed some credit for it.

Q. And now, referring to the attached document to this exhibit, I will read briefly from the general statement that is attached.

“Profit Presented”

“It is believed that the preceding fiscal year, ended March 31, 1945, is the measure of the results which, but for the fire, would have been shown during the year ended March 31, 1946. The insured is prepared to demonstrate, if desired, that its cutting program for F.Y.—3/1/46, was very similar to that of F.Y. 3/31/45, and was expected to produce quantities of logs, by species and by grade, in every way comparable to those actually produced in F.Y. 3/31/45.”—Is that correct?

A. That is correct.

Q. That was the assumption both parties used—the appraisers used all the way through this appraisal, wasn't it?

A. Yes. [31]

(Testimony of Frank Momyer.)

Q. Now, actually you did not carry over normally any log inventory from one season to the next? A. Not any log inventory, no.

Q. In other words, as I understand it, your logging commences about the 1st of May or the middle of April—you begin to log. At that time, your mill which had been shut down during the preceding winter under normal circumstances begins to operate, as the logs begin to come in?

A. That is right.

Q. Then the mill would continue operation, and logs would continue to come in until you said about the end of November, when the snow set in?

A. Usually about that date.

Q. And then your mill would continue to run for a short period after that, to cut the logs that had been brought in in that season, the balance of them—then the mill would shut down?

A. That is right.

Q. Substantially is it correct that both the logging and the mill, the logging operations and the mill itself were shut down for the winter months?

A. That is true for a certain length of time during the winter.

Q. How months about—December, January February, March and April—four and a half to five months?

A. For the logging department, for the sawmill it would be less time than that; the sawmill had to cut up the logs that were on [32] hand at the end

(Testimony of Frank Momyer.)

of the season, that usually would run anywhere from January to the following March.

Q. In other words, the sawmill would run for maybe—how much longer a year?

A. A month to two months after the logging.

Q. But then there was a lag when it didn't run after the logging operation started, wasn't there?

A. No, they are almost coincidental, just a few days when the logs begin to come to the mill, we start our sawmill and continue then until we saw up all the logs brought in.

Q. And now, with respect to the lumber that went to the box factory, the footages are computed similarly on the basis of the fiscal year, ending March 31, '45, were they not?

A. The lumber that went to the box factory following the fire in the nine month period following the fire—is that what you mean?

Q. I don't know. I will call your attention to the statement—I am referring to on page 2 of the attached exhibit K second paragraph as to lumber sent to the box factory, the footages used have been similarly computed—with reference to the fiscal year ending March, 1945, what does that mean?

A. In computing the overall profits from the operation, we took in both the lumber sold on the market, as lumber, the lumber going through the box factory—I see here it mentions 40,000,000 feet which represent a portion of the production—[33]

(Testimony of Frank Momyer.)

which was sold as lumber, the rest of it would be sold as box shooks to the box factory, and retained in the inventory sale—it did not equal production.

Q. I think you also stated in here that in computing the realization, (I am reading from page 2) which would have been produced in the fiscal year ending '46, there have been used, for the loss period, the realizations actually produced in the fiscal year '45, you recall that?

A. I didn't get a clear understanding of the reading.

Q. I think it is only fair you should look at this.

A. That is 1B you are talking about?

Q. Yes.

A. Yes, in computing the realizations or the profits for the fiscal year 3/31/46.

Q. And that was the prior year?

A. We substituted the fiscal year 3/31/45, that was the experiment year we were going to use for the purpose of that claim.

Q. I believe you also said there, about that same point, prices were stable in '46 and were identical with those in the fiscal year of '45?

A. We were still under the ceiling price at that time, and as far as we could see there was no reason to make any substantial adjustment one way or the other in the sale price or any of the costs, because the ceilings were still in effect and labor was also under wage stabilization at that time. [34]

Q. Speaking of labor, is it not a fact that com-

(Testimony of Frank Momyer.)

mencing November 1, 1945, there was a substantial increase in hourly wage?

A. No, there was an increase made November 16, as I remember.

Q. 1945? A. 1945.

Q. And so that amounted to about an 8 to 10 per cent increase in your labor cost over the preceding year, did it not?

A. Yes, but the logging operations were practically completed then because we only log until the end of November, the cost incurred that year would have been the same as before, because up to November 16 they were exactly the same and we were practically through.

Q. Will you show me on that claim you have in your hand, the page that deals with the calculations of the differentials in logging cost, so-called excessive logging cost?

A. On page 22, schedule 4, Roman Numeral III.

Q. What period in computing the increased cost, what period did you use—you used six months up to June 30, 1945, as compared with six months after June 30, 1945?

A. No, we used the three months, preceding July 7, '45, and then we used the period after the fire; logging operations continued up until about October 8, 1945, preceding the wage increase on November 16.

Q. And now, on page 3 of the exhibit attached

(Testimony of Frank Momyer.)

to the document—attached to exhibit K—I will read. [35]

“Lumber converted into shook has been charged at the average costs incurred to the point of diversion, plus box factory processing and disposal cost.”

Now, this of course has to do with the box factory operation, doesn't it? A. That is right.

Q. Now, will you explain, please, what is meant by average cost?

A. Average cost might be stated as the actual cost up to the point where the lumber is diverted either to the planing mill, and shipping dock for shipping lumber, or diverted to the box factory for further processing into box shook, where it is loaded and shipped out as box shook.

Q. Well, now, you say actual cost. If we take any fiscal year period such as the fiscal year 1945 that is ending—3/31/45, the books would of course show the actual cost incurred by Pickering Lumber Company in producing the lumber to the point of diversion of the box lumber. In other words, you know how much you spend for logging, you know how much you spend for operating your mill. Then after you got out of the mill, you came to the point of diversion, didn't you?

A. After it was through this drying process, it was rough lumber then.

Q. Now then, you know your actual cost up to that point, don't you? A. I do. [36]

Q. In calculating those costs, you allocate, and

(Testimony of Frank Momyer.)

appropriate portions of your general overhead?

A. No, we do not. Under our accounting procedure we do not attempt to allocate overhead to any department. It would be shown on our statement that we take overhead off in a separate caption under our profit and loss statement—in the one group we do allocate to any department.

Q. Well, but in calculating your cost of operation, in determining what you call average cost at the point of diversion, is it your testimony then that no overhead is taken into consideration?

A. For this claim purpose, here, we did take into account the overhead and at the request of the insurance companies, attempted to allocate some of that to the logging department, and some to the box factory.

Q. You understand my question relates to the statement in this claim that average costs were used, and I ask what was meant by that—so that then I understand your answer correctly, in computing these costs, you take all of the cost incurred up to the point of diversion, including the appropriate portions of the overhead, do you not?

A. Including all of the overhead.

Q. And then you divide that by the number of feet of lumber that you have—in other words, that you have put through this processing, is that correct? [37]

A. That is correct.

Q. And by that means you get an average, what you call an average cost, is that right?

(Testimony of Frank Momyer.)

A. That is correct.

Q. And now, your lumber products sold for varying prices, did they not? A. They did.

Q. What was, for instance—was the highest per thousand feet sale price you had on any character of that lumber you produced at the point of diversion?

Mr. Whittaker: After the fire, Mr. Levit, or what period—would you mind stating?

Q. (By Mr. Levit): Let's take—take the '45 period, for example. Just give us the range of prices that you dealt with.

A. Well, I see some footages were sold as high as \$113 per thousand, that was a very small footage, and some of it sold for \$30.95, I believe that is the lowest I see here.

Q. Your plant used lumber, was figured at even a lower figure; wasn't it somewhere around \$20?

A. Yes, we just use an arbitrary figure on that—it is in and out anyway—we add it on one side and take it out the other, it doesn't make any difference whether it is \$40 or \$20, you wash it out at the end.

Q. Let's forget the plant use lumber and let's take your price range on the others. It runs then from \$100-\$113, I think [38] you said, down to around thirty? A. That is right.

Q. And now, you said that was the actual cost—actually what is that, just what is determined, is it not, as average cost. In other words, merely a calculation where you divide your actual cost by the

(Testimony of Frank Momyer.)

number of total feet run through the mill, isn't it?

A. It is in the total money that you spend in bringing in and producing a given footage of lumber.

Q. It is not the total money you spend, Mr. Momyer, the total money you spend—it is merely the amount of your actual cost, it is the total of the money you spend divided by the number of feet in total that you produce, to give an average cost?

A. Per thousand, yes.

Q. So opposed to that figure of average cost, Mr. Momyer, did you ever use of allocated cost on lumber products?

A. Yes, I have heard of allocated cost on lumber products—and on many other products.

Q. Will you explain here how an allocated cost is figured?

A. Well, an allocated cost in the first place is purely a theory as far as I am concerned, and most businessmen do not use it for any purpose other than taxes—materially used for income taxes. The attempt to calculate that same profit, in the case of lumber, for each grade of lumber produced, by allocating it to those various grades of lumber produced, a [39] cost on the basis of the sales price, and in other words, if the lumber sells for \$100 a thousand, and the average cost is \$5 per thousand, and another grade of lumber sells for \$40 per thousand, and some more sells for \$70 per thousand, then this theory is the same profit as realized on

(Testimony of Frank Momyer.)

each grade of lumber and therefore you should allocate to these various grades, the cost is proportionate to sales value of the grade and thereby getting the exact same profit from each grade of lumber sold.

Q. Do I understand you to say you consider it more unrealistic to use a cost which attributes the same profit to all the lumber in a different grade than you do to using a cost method which attributes the same cost to all lumber regardless of grade?

Mr. Whittaker: Just a minute, please. I believe the question is not what may be considered as realistic or unrealistic, it involves the province of the Court in dealing with the question of law, and I object to the question.

(Thereupon argument was made to the court by Mr. Levit.)

The Court: I see your point. I am going to overrule the objections. I'd like to have it determined, to find out what the various methods of accounting are.

Q. (By Mr. Levit): Now, it is a fact, is it not, Mr. Momyer, that the question of determination of cost for the product which comes through a joint process is a very difficult one as to which all accountants are not in agreement? [40]

A. Well, I think that that is true; as stated before, I think the real purpose of allocating cost is primarily for tax purposes. I know in our case, we will to keep our board informed, for our own

(Testimony of Frank Momyer.)

information in running our business up there, operate on the basis of the average cost, or the actual cost if you want to call it, because we couldn't tell which lumber is profitable for us to produce, if all of it sells at exactly the same price. Now, there is no difficulty—the reason I think allocated cost is purely fictional, because I can find no basis to think that because one board sells for \$100 a thousand and another sells for \$35 a thousand, that the hundred dollar board actually costs twice as much to manufacture as the thirty-five dollar board. To demonstrate, starting with the logs in the woods, all grades of lumber are in one package in the form of a tree. For the wood you cut in that tree you pay so much a thousand for the cutting of the tree regardless of how many grades are involved in that tree. You pick that log up and load it on a car and bring it down to the mill, still in one package, you send it through the saw and you get various grades of log from that lumber. But I defy anyone to show that one board in that log costs you more than another board in the log, regardless of what it sells for. It is true that some of it is more valuable to you because it sells for more, but I cannot see there is any basis for it to say that one board actually costs you more dollars to produce than the other one. [41]

Q. In other words, then, if I understand you correctly, the only reason Pickering would have for bothering with cost allocation at all—allocated costs

(Testimony of Frank Momyer.)

we have been calling among the different grades, would be in the computation purpose, is that correct?

A. That is correct. I call your attention that we do on a very limited basis of only nine segregations, and that is done only on the lumber sold as lumber, we make no attempt to make an allocation for the lumber that goes in the box factory.

Q. You wouldn't bother to use allocated basis for lumber going to the box factory?

A. We do not. It may sell as lumber or as box shook as explained by Mr. Whittaker, if we are going to carry it through as allocating a higher cost, going as lumber to the box factory than lumber sold on the market, during the period under question here.

Q. Is it not a fact, Mr. Momyer, that Pickering Lumber Company accountant also showed the box factory operation on the basis of the O.P.A., or value in place, or market price figure?

A. Yes, that is true, that is just for management purposes. In other words, if we are to know whether the box factory is a profitable operation to us, whether we should discontinue it if it is unprofitable, we need to measure the result of that box factory to do that. We take then this price at the box factory door and add on the manufacturing cost, and take the sales price of the shook and find out how much of that is adding on to the [42] profit or loss of that lumber. If that makes a

(Testimony of Frank Momyer.)

greater profit than it would have made had it been sold as lumber, the box factory may be a profitable operation to us.

Under the O.P.A. cost of lumber, we might still lose money. For example, it might be that the value of the lumber at the box factory door was \$30, as has been attempted to show here in this appraisal that was made. That means it could have been sold as lumber at that price on the market. Now, maybe we run it through the box factory and we get an additional \$5 profit out of that lumber. Therefore the box factory is a profitable operation to us. It adds more to it than we would have gotten if we had sold it as lumber. It might even still produce a loss and be an advantageous operation to us. We lose \$10 at the box factory door, and only \$5 after processing and selling it as shook, and it has been a profitable operation too, even though it still produces a loss, so far as the actual cost of the lumber is concerned.

Q. Mr. Momyer, in other words, you use the inflated value, or O.P.A. price in your own calculations, and own books in order to determine which operations are making a profit, don't you?

A. We do to that purpose. It goes to our profit and loss statement—that is washed out, it isn't carried in there at all.

Q. Your profit and loss statement so far as the individual department is concerned at the box factory is no concern to [43] Uncle Sam, in connection with income taxes, is it?

(Testimony of Frank Momyer.)

A. Uncle Sam is concerned with what profit you make.

Q. Overall?

A. Not what one department makes.

Q. So that if you do make those calculations for the purpose you say, in order to determine the profit, you are not doing it for accounting reasons but for actual reasons of management, in order to ascertain whether a particular operation is profitable or not, aren't you?

A. That is the purpose of that statement in our schedule.

Q. With reference to your statement that average cost is generally used in costing products in industry, or joint products, I am going to ask you if you agree with this statement that from Raphael & Harris' book on cost accounting and principles and methods, issued in 1948, on page 494 to 97 of taxes. It deals with accounting methods for joint products, and after pointing out there are a number of methods of accounting in joint products, no one of which is said to be the only correct, it says on page 495—

Mr. Whittaker (Interrupting): If your Honor please, I am going to object to the reading from the textbook to the witness and asking him whether he agrees. I think that is not proper—I believe that it is immaterial, it is to argue the law.

The Court: Generally speaking, unless this witness is [44] an expert witness and refers to the text

(Testimony of Frank Momyer.)

himself, it is my understanding that in the rules of evidence they can't be used.

(Thereupon a short argument was given by Mr. Levit.)

The Court: Go ahead.

Q. (By Mr. Levit): On page 495, the statement is made, "When the products are produced jointly, it is not possible to determine the cost of each product with absolute accuracy, the method used is to distribute the joint cost and select approximately the correct result which may be obtained. The possible methods are prorating a joint cost, as according to the relative sales value, market value of the joint product in a given case."

And then the text goes on to quote an example of the application of the market value method followed, and they used the lumber industry as an example of the way of calculating the cost as popularly done by accountants in the lumber industry, and points out that that is how the principle works—as it is already done, you can see that in fact, Mr. Momyer, isn't it a fact that the lumber industry in general, the principle of determining the profit of a particular operation, or particular grade is done on an allocated cost basis, that is the general practice?

Mr. Whittaker: Same objection, your Honor, as heretofore made.

The Court: I will overrule it.

The Witness: I think it is done for management

(Testimony of Frank Momyer.)

purposes, [45] as stated before that most of them at least I believe you will find practically all of them get to their profit and loss statement and wash it out, pay no attention to it. It is a subsidiary statement which tells whether an operation may be profitable to them or not. Allocated cost is used mainly, I stated before and I state again, I believe for income tax purposes. Some accountants a long time ago hit on the idea some possible gain could be obtained for tax papers by using that basis. It doesn't always work that way—sometimes it does.

Q. In other words, if you want to determine your overall profit, you can do it on the basis of average cost, can't you—do it on that basis for your books as a whole, isn't that correct?

A. That is right.

Q. If you want to determine any profit of a particular department, you have to take into consideration an allocated cost based on the market value of the product, do you not?

A. In the case of lumber, it could be sold on the market, under certain market conditions, and there are times when the box factory lumber can hardly be sold at all. In the case where a product could be sold as lumber on the market, and could be sold as box shook—to determine whether you should sell it as lumber or sell it as box shook, you need some information for management to tell you which to sell that lumber.

Q. As a matter of fact—are you familiar with

(Testimony of Frank Momyer.)

the method by which the O.P.A. fixes the ceiling prices on the lumber products? [46]

A. I can't say I am, particularly.

Q. Aren't you aware of the fact that in setting the ceiling price on lumber products, including box lumber, the industry was asked to compile, and did compile and submit to the O.P.A. the costs of products allocated by grade—and that then the question of existing market prices, and reasonable profits, were taken into consideration, and applied to these allocations and that is how the O.P.A. prices were fixed. Don't you know that to be a fact?

A. No.

Mr. Whittaker: I object to the question.

Mr. Levit: He understands the question, don't you?

A. I do not.

Q. (By Mr. Levit): Now, at this time we offer in evidence a letter from Robinson & Nowell Company to Mr. Withers, dated August 14, 1946, to which is attached a sheet headed "Use and Occupancy Claim."

The Court: As long as they are looking it over, I think we will take a five minute recess.

(Recess.)

Mr. Levit: I will ask you, Mr. Momyer, if you are familiar with the facts of this letter I now hand you, dated August 14, 1946, to Mr. Withers from the Robinson & Nowell Co. that was sent to them in connection with his claim at that time, sent to the adjusters in connection with the claim? [47]

(Testimony of Frank Momyer.)

A. Yes, I remember that letter—it has been a long time since I have seen it.

Q. And there were some schedules that went with it, were there not? A. I believe so.

Mr. Levit: We will offer the letter in evidence, and asked that it be marked Plaintiff's Exhibit next in order.

The Clerk: Plaintiff's Exhibit L in evidence.

(Whereupon the letter of August 14, 1946, to Mr. Withers from Robinson & Nowell Company was received in evidence and marked Plaintiff's Exhibit L.)

Mr. Levit: I will read briefly from it, your Honor. In this letter submitted further schedules in connection with the tentative claim, and on page 2, and page 3, there is a reference to the box factory salvage figure here. This statement shows that subsequent to the fire on July 7, 1945, the factory processed 8,000,000 plus feet of lumber into shook, the shook production, all told, was 8,000,000 plus feet, about 200,000 feet under.

Mr. Whittaker: 190,000.

Mr. Levit: The total realization from the shook, including the actual sales realization in the period average annual additions for extra returns and wage savings which are only determined on an annual basis. The gross realization is therefore \$60.22 per thousand feet of shook. The cost of the manufacture of shook is determined by subtraction of cost for three [48] months to June 30,

(Testimony of Frank Momyer.)

from the cost for twelve months ending March 31, the difference yielding the true cost for nine months after the shutdown. These costs have all been used in the statement except for vacation payroll used on a twelve months' average depreciation based on the 1944-5 average cost and overhead which has been constructed to be 62 cents per thousand. And thus the total cost of manufacturing and shipping is \$13.58 per thousand feet of shook. The difference between the realization of \$60.22 per thousand and the cost of \$13.58 per thousand is \$46.64 per thousand, which may be said to be the conversion value of the lumber, that is, the net return for the lumber used in the factory after deducting the cost of conversion. The lumber used in the factory was 8,828,644 feet, and it has been determined to have a cost of \$39.80 per thousand at the factory door. This cost is a composite of 11,814,000 feet produced from the latest operation of the sawmill, and 3,619,000 taken over from the inventory of March 31, 1945; the cost of the former as dry lumber in the yard was \$35.67 per thousand, the inventory cost of the latter was \$28.94 per thousand, the composite was \$34.09 per thousand to which is added dry handling costs and administration and overhead, less credits, amounting to \$5.71 per thousand, making \$39.80 per thousand. The statement is based on the premise that the profit on the box factory operation is based upon the cost of the lumber used in the factory in an inte-

(Testimony of Frank Momyer.)

grated operation where the entire quantity of [49] lumber available to shook has always been remanufactured at the plant; further, that when cost of lumber has to be found, it is the cost of the most recently manufactured product to the extent of such production and to the next most recent production for the balance, and so forth.

Q. (By Mr. Levit): Mr. Momyer, do you happen to have the report of the Robinson, Nowell & Company for Pickering's operations for the test year, the fiscal year ending March 31, 1945?

A. Yes, I do.

Q. And this report that you have was furnished, of course, to the appraisers, was it not?

A. Yes, I am sure they had it, also the adjusters.

Q. And that report contained the figures for the test year? A. It does.

Q. Will you detach that piece of paper?

A. Well, are you going to take that away from me?

Q. I am going to put it in evidence.

A. I haven't another copy of this to work from.

The Court: You may introduce it in evidence, and then take it back.

Mr. Levit: We offer this report of the auditors in evidence, dated on the cover March 31, 1945, bearing the name of Pickering Lumber Company Corporation, and the name of Robinson & Nowell & Co., certified public accountants.

(Testimony of Frank Momyer.)

The Clerk: Plaintiff's Exhibit M in evidence.

(Whereupon the statement of Pickering Lumber Company dated March 31, 1945, was received in evidence and marked Plaintiff's Exhibit M.)

Q. (By Mr. Levit): And now, calling your attention to page 2 of that report, you will note the statement that the Internal Revenue agent office required that the valuation of the inventory be based on an allocated cost instead of an average cost and accordingly the company filed a recomputation of the inventory based on an allocation cost over the ten principal grades or species, for the year ending March 31, 1942 to 1944, the net result of which March 31, 1944, was decreased in value of \$11,000 odd dollars, and for the year ending March 31, 1945, a decrease of \$51,000. That is a correct statement, is it not?

A. Yes, I stated heretofore we were required to do that for income tax purposes.

Q. I would like to interpolate, to get one point with respect to the relationship of allocated cost and average cost. If you view the operations of the lumber company such as Pickering from the overall picture, in other words, you don't attempt to break them down by departments, and you calculate profit on the overall operation, your result will be precisely the same, assuming all the lumber is sold at the end of the period, the result will be

(Testimony of Frank Momyer.)

precisely the same whether you figure that on an allocated cost basis, or whether you figure it on an average cost basis. [51]

A. You would use the same dollar, the trouble is it never happens that production and sale are equal.

Q. I understand that. I mean to say that on an overall basis if you take that hypothetical case where you assume that everything is sold, you don't get the complication of that point. You would come out exactly the same with the amount of profit whether you used an allocated cost, or an average cost, wouldn't you?

A. The same dollar would be involved.

Q. Then therefore the only reason, or use of the allocated cost, or price from one department to another is the basis of the market, or in place value, or O.P.A. price, in order to segregate or separate the profit made in the various departments, one from the other, isn't that right?

A. The O.P.A. and allocated price are two different things.

Q. I realize that. Basically an allocated cost is based upon the market price, isn't it?

A. That is right.

Q. And according to the exhibits which were introduced in evidence this morning, plaintiff's exhibits which were the letters you wrote in connection with your stock loss claim, that was exactly what you did in determining the in place value.

(Testimony of Frank Momyer.)

You used the O.P.A., didn't you, on your inventory?

A. Yes, we were trying to determine actual cash value for the fire insurance loss, at that time. [52]

Q. And I suppose that when your accountants in the box factory operation, or in the box factory statement attached in this report which has just been introduced, used O.P.A. or market prices, in place prices, in connection with the calculation for box factory profit, they did that for insurance purposes?

A. They didn't use it for insurance purposes. That is management purposes.

Q. Is it not correct, the only reason you were making use of the O.P.A. prices by your accountants was on account of the fact you had an insurance claim to present?

A. I did not say that.

Q. I misunderstood you, Mr. Momyer. I asked you about the use of the O.P.A. prices in the calculations you made to determine in place value in the inventory figures you furnished to the insurance company, and you said the reason we did that—I understood you to say the reason we did that was because we were making a determination for an insurance claim.

A. That is right. You further asked me also used it on our books and inventory, and my answer was that no, we do not use that at all.

Q. If you will turn to exhibit 6, schedule 6 of

(Testimony of Frank Momyer.)

that report, which is plaintiff's exhibit M—Robinson & Nowell's report for the test year, that deals with the box factory operation, does it not?

A. Page 6? [53]

Q. Page 6, schedule 6.

A. Yes, that is the same calculation we make for management purposes.

Q. So that if you look down that sheet there, you start out in your box factory operation, your auditors start out and take your sale, or realization, don't they, from the sale of the box shook? That is the first division, isn't it?

A. That is right.

Q. And they come out with the net after taking into consideration freight savings, and sale adjustments, and discounts, they come out with a gross realization of \$55.31 a thousand, don't they?

A. 55.31.

Q. I am sorry—59.53.

A. That is right.

Q. Then the next calculation is what they call cost and sale, isn't the purpose of this schedule to arrive at profit of the box factory, isn't it?

A. No, it is to give the management a picture of what the box factory is doing; if you want to get a true picture of the income tax, look on page 6 of the statement. This is for management information the same as the monthly statement shows.

Q. What is that purpose—you are going to come out after you make these calculations, you are go-

(Testimony of Frank Momyer.)

ing to come out with a profit or loss. That is the only purpose of making the calculations, [54] isn't it?

A. To show the management this operation was worthwhile, and should not be discontinued, or expanded and continued further.

Q. In order to know that, you have to know what profit you made on it, don't you?

A. How much more it is making for you than it would have made if you had sold it as lumber before it went through there.

Q. You take then the cost of the sale, and I read you items under cost and sale—I would like very much for your Honor to examine this document at the same time. We are just talking about the sale coming out with the realization of 59.53 per thousand in this preceding year—the last column is the cost of sale. Now, that first line reads: "Lumber to the factory, value in place 16,000,000 plus feet at a price of \$29.17," right? And then some minor adjustments are made, a minor adjustment was made, and you come out with a price of \$29.99, then you would deduct another minor adjustment and come out with the figure of \$28.44. Now, you show then the net cost of the lumber to factory, value in place that lumber went through the box factory at a figure of \$28.44.

Now, let me ask you, Mr. Momyer, where that figure came from. How was that figure arrived at, or any of the figures that I have just mentioned

(Testimony of Frank Momyer.)

preceding the \$29.17, or \$29.99? Isn't it a fact those are the O.P.A. or market values, or in place value price, just as it shows on the inventory we introduced [55] this morning?

Mr. Whittaker: What do you mean? You asked about four questions in one. I have been sitting calmly by, because the witness is well able to take care of himself. I think it is unfair to ask him those kind of questions.

The Court: As I remember, the question asked whether this \$29.00 was based on O.P.A.

Mr. Whittaker: That will suit me.

The Witness: It is so based.

Q. (By Mr. Levit): It is so based?

A. It is so based.

Q. And then, Mr. Momyer, next are taken out under the cost of sale, the cost of manufacture, which we run through here, and then depreciation, and then sale waste, and then you finally come out with the total cost of manufacture, and then you take your change in inventory and finally get a figure of the total cost of the sale, is that correct?

A. That is right.

Q. Then you take off your shipping expenses, rather add your shipping exenses and get the total cost of the sale. Then you get—you go back up to the top of the second—and take your sale realization, and by the process of subtraction, you arrive at a figure of the net gain over market value of lumber, of \$20.89 by the operation of the box factory. Is that correct?

(Testimony of Frank Momyer.)

A. That is right. No mention is made to the profit—net gain [56] over it.

The Court: What does that mean?

A. That is the gain over what you could have sold that same lumber on the market—in other words, that is showing you——

Q. (By Mr. Levit, interrupting): You make that calculation, as you said, for the purpose of determining whether or not it is worthwhile operating the box factory?

A. That is correct. The true income statement is on page 6.

Q. Now, as you said for your own purpose you kept your books on the basis of an overall realization, and used average cost in making up your final statement, didn't you?

A. That is correct, as far as our books are concerned. I might add we still have to make this adjustment for income tax purposes on an allocated cost basis, on only nine segregations. If you are going to total the true allocated cost theory, there are a hundred different grades or more, that all sell at different prices and to produce a true allocated cost it would be necessary to use all of those ceiling prices and attribute the cost to each one of them. It is obvious then that this is just a very modified form of an allocated cost done for tax purposes only.

Q. Isn't it a fact, Mr. Momyer, that the extent to which you break down the grades in determin-

(Testimony of Frank Momyer.)

ing an allocated cost basis, is purely a matter of convenience and a matter of managing—management judgment? [57]

A. I would say if you are going to follow an allocated cost theory, you would have to take each and every grade that sells at a different price. That is the theory.

Q. You might even take every piece that sold at a different price, for that matter, wouldn't you?

A. You certainly would.

Q. And that is your understanding of the way—proper accounting method of determining allocated costs, take every grade—a hundred of them if necessary—and any slight difference in price in order to determine any kind of a proper accounting?

Mr. Whittaker: I object to the question as argumentative.

The Court: I think so.

Q. (By Mr. Levit): Now, I will call your attention to page 11 of this statement, and to the figures about a third of the way down the page which show the profit on lumber sales, you sold as lumber out of the factory in the year, the test year, and your average profit, your profit per thousand, I should say, for lumber sale was \$3.65 per thousand, was it not?

The Court: That was sold out of the factory?

Mr. Levit: Sold out of the mill.

A. Referring to another supplemental schedule,

(Testimony of Frank Momyer.)

it still isn't the income tax statement yet—a supplemental schedule made on lumber sales alone.

Mr. Whittaker: What?

The Witness: Lumber sales alone, not including the [58] box factory.

Q. (By Mr. Levit): That is a correct figure, is it not?

A. \$3.65 is the correct figure there.

Q. Now, further down on this schedule, page 11, is an item—profit on lumber to the factory of \$14.55. Now, that figure is based on the average cost. In other words, that is what you are telling to the Court when you stated that in carrying the box factory detail—we just look at the back of your book for the accounting purposes, you used the average cost rather than the market value, or value in place, don't you?

A. That is the same figure that appeared in schedule 6, referred on page 16, you were talking about a moment ago.

Q. Only appears in schedule 6, because had you reversed—the accountants reversed the operation we just went over in such detail, after arriving at a profit or gain over the market value of lumber, they then reversed that calculation so far as the value of the lumber is concerned, as you testified you then used market value—I mean average cost of the lumber, you come out with a profit—you carry your books, basis of an average cost of \$14.55, isn't that right ?

(Testimony of Frank Momyer.)

A. That has not here been done. That is down on page 10, on the preceding page all in the subsidiary schedules.

Q. Regardless of where it is done, that is what happened?

A. This is still on the basis—\$14.55 is the basis of profit, on the basis of the lumber going into the box factory as though [59] it were sold—we calculated that \$14.55 on that basis. It is the same figure we are talking about on page 16.

Q. Let's be sure we do understand each other. Schedule 6 is a statement of the box factory operations for the test year in an attempt to arrive at the profit, is it not?

A. That is right.

Q. Arrive at the net gain over market value of lumber, of \$20.89, doesn't it?

A. That is right.

Q. Then it starts over again and it takes the lumber to the factory at value, and then on the factory as shown before, the realization of the lumber—you get the realization for the lumber, then deduct from the realization the cost of the lumber at the factory to \$37.39 is your average cost, isn't it?

A. That is right.

Q. And then you come out with that \$14.55 figure, the one I called your attention to in schedule 1?

A. That is right.

Q. And that figure is arrived at by using not the value—the place or market value, or O.P.A.,

(Testimony of Frank Momyer.)

but arrived at by using average cost?

A. \$37.39 average cost.

Mr. Whittaker: What is that figure?

Mr. Levit: 37.39.

Mr. Whittaker: May I ask, is that the average cost to the [60] diversion point?

A. That is right.

Q. (By Mr. Levit): And then on page 4, and I read briefly.

(Mr. Levit reads a portion of the report.)

Now, on page 17 the total cost of the lumber sold and used before manufacture, the total cost is shown as \$22.00 a thousand and the cost of the manufacture at \$9.26, and the total is \$31.62, then adjusted for inventory, and handling to the figure of \$37.39, and that is the figure, is it not, Mr. Momyer, that you have used in the proof of loss, as the so-called average cost to the point of diversion. Is that right?

A. That is true. The \$31.52 before overhead expenses are added. You will note that overhead expenses on the next page, to come out to the total of \$37.39.

Q. Part of the same schedule on page 22?

A. The 31.52 is not the complete figure.

Q. On page 22, the inventory—headed inventory, is the trial, basis of the first tabulation for the fiscal year ending 1944, and the second portion would be the tabulation for the fiscal year ending March, 1945, the test year. Now, calling your attention,

(Testimony of Frank Momyer.)

Mr. Momyer, to the column in about the middle of the page headed Current Year Per Thousand 1945, March 31, 1945, those figures in that column are as stated at the top of the column allocated cost, are they not?

A. Yes, for the income tax purpose—stated nine segregations [61] taken for this purpose.

Q. And those allocated costs are calculated, of course, on the basis of the O.P.A. market price, aren't they?

A. On lumber sold only. It had nothing to do with the lumber going through the box department.

Q. You mean your inventory on footage does not include the lumber that went through the box factory?

A. This calculation does not.

Q. I call your attention to the fact all ten grades are included there.

A. Ten grades sold as lumber, yes.

Q. You did sell some box lumber, did you?

A. No, that wouldn't necessarily follow—there might have been some sale of lumber—

Q. (Interrupting): Let's not go too far afield here. Look at this schedule 10 on page 22, and you will find listed in your inventory there in excess of 4 and a half million feet of box lumber, under mixed pine. I thought you said you didn't sell any of that lumber?

A. That is an end of the year inventory, it doesn't mean we sell it—it is an inventory figure.

(Testimony of Frank Momyer.)

Q. Just tell whether that was included or not, whether that was lumber that was sold—whether box factory lumber wasn't included?

A. I said the purpose of this schedule was to carry out the request of the Income Tax Department, we applied it to our lumber [62] sales—allocated cost in order to calculate it—that is what we have done.

Q. I understand that, but what I asked you was this: is there anything in the last column which shows that the allocated cost for the current year per thousand are—an allocated cost figure based upon the O.P.A. ceiling price, is that not correct?

A. That is correct.

Q. Is it not true, you said a moment ago that those prices were not used with respect to lumber going to the box factory, that was true of all the lumber that you had in your inventory going to the box factory or not, wasn't it?

A. It was not applied on any lumber that went to the box factory, because we didn't sell that.

Q. What became of the four and a half million feet listed in this inventory under mixed pine under the heading "Boxes" 4,592,—some-odd hundred of feet; didn't that lumber go to the box factory?

A. I think it did, yes, sir.

Q. Isn't it a fact the figure \$21.51 for allocated cost must have been determined on the basis of OPA ceiling prices?

A. I don't see the \$21.51.

(Testimony of Frank Momyer.)

Q. Follow that line right on out; you will see it in the middle column of the page.

A. I thought you were talking about this 44 year.

Q. I am talking about the test year, the year 1945, ending [63] March 31st, 1945.

A. That is all right, as far as the inventory evaluation is concerned. We still don't calculate a profit or loss on it, we don't sell it——

Q. (Interrupting): It is a fact, isn't it, that you used the OPA ceiling price because of the ruling of the Income Tax people in determining an allocated cost on inventory, is that correct?

A. We didn't use it to determine allocated cost on inventory.

Q. It is also correct that you used the OPA price in determining the gain made in the box factory for management purposes if you will,—for that purpose had nothing to do with the income tax ruling in connection with the setting up the operations of your box factory, isn't it?

A. That is right, we used it for management purposes, not for income, or to profit and loss.

Q. Now, it is a fact, isn't it, Mr. Momyer, that the calculations were necessary to be made in order to determine the amount that should be paid by the insurance company under these used and occupancy policies—were quite complicated?

Mr. Whittaker: If the Court please, I think

(Testimony of Frank Momyer.)

that is calling for the conclusion of the witness.

The Court: I will let him answer the question. I think it is complicated myself.

A. They are complicated, but there was another way of presenting [64] the claim that would not be complicated.

Mr. Levit: I didn't ask you that, Mr. Momyer, I asked you if they were complicated.

(Thereupon an argument was presented to the Court by Mr. Levit.)

Q. (By Mr. Levit): Now, Mr. Momyer, it is your statment, then, that no question of accounting judgment were involved in determining the proper amount to be paid under these policies, but that matter—was just a matter of going to the books and getting the answer?

Mr. Whittaker: If the Court please, I will object to that question on the ground it is calling for the conclusion of the witness, and it is argumentative.

(Thereupon a short argument was delivered to the Court by Mr. Levit.)

Q. (By Mr. Levit): I will now show you, or perhaps offer in evidence with that identification the reply affidavit of Pickering Lumber Company which has already been referred to.

The Court: What is that exhibit number?

The Clerk: Plaintiff's Exhibit N in evidence.

(Testimony of Frank Momyer.)

Mr. Levit: I think that is already in—what is the number of that?

The Clerk: Plaintiff's Exhibit E.

Mr. Levit: I will withdraw that offer. Now, Your Honor, I would like to read certain portions of that document at this [65] time, on page 3, subparagraph c. I should say this is a reply affidavit filed with the insurance company in connection with this claim, and signed by Mr. Momyer and Mr. Johnston.

“The policies of insurance designated and described in the final proof of loss do not physical articles or properties, but, on the contrary, cover an intangible item, namely, the loss caused by interruption of business of the insured due to the destruction of its physical properties by fire. Since the business of the insured could not be operated because of the destruction of its physical properties, the insured can only estimate what its profits and expenses would have been had it operated during the period following the fire when, in fact, it could not operate because its properties had been destroyed by fire. It is therefore compelled by the terms of the policy to estimate what its profits, expenses and fixed charges would have been had it operated the business during the period when the business was not operated.”

Mr. Levit: And on page 4 there is again a reference to the period following the fire and I quote:

No. 12491

United States
Court of Appeals
for the Ninth Circuit.

PICKERING LUMBER CORPORATION, a corporation,

Appellant,

vs.

THE AMERICAN INSURANCE COMPANY,
et al.,

Appellees.

Transcript of Record
In Two Volumes
Volume II
(Pages 289 to 622)

Appeal from the United States District Court,
Northern District of California,
Southern Division.

APR 25 1950

PAUL P. O'BRIEN,

CLERK

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(Testimony of Frank Momyer.)

“When in fact the business of the insured could not be operated and accordingly the actual profits, the fixed charges and expenses continuing, and other charges and expenses incurred could only be ascertained by estimate.”

Down at the bottom of the page I quote again:

“The insured does not believe that it is required by any of [66] the terms of policies to furnish any further details which under any circumstances can only be estimated since the properties cannot be operated by reason of their destruction by fire. Based upon this estimate, the insured claims that the actual profits presented were at least 366,241, and possibly more.”

Q. (By Mr. Levit): Mr. Momyer, I show you a letter headed Pickering Lumber Corporation, purported to be signed by yourself and Mr. Johnston, addressed to Mr. Frank Maloney, a Mr. Anson Herrick, dated February 28, 1947, and ask you if you signed that letter, and if it was sent to those two gentlemen whose names appear on or about that date?

A. Yes, sir, I can remember that.

Mr. Levit: We will offer this letter in evidence, and ask that it be marked Plaintiff's Exhibit next in order.

The Clerk: Plaintiff's Exhibit N in evidence.

Q. (By Mr. Levit): Mr. Maloney, one of the addresses on this letter was the appraiser appointed by the insurance company, was he not?

(Testimony of Frank Momyer.)

A. That is right.

Q. And Mr. Anson Herrick was the appraiser appointed by Pickering Lumber Corporation?

A. That is right.

Q. Pickering Lumber Corporation acted in this appraisal, and throughout early appraisals, under the advice of counsel, did it [67] not?

A. Well, counsel was in with us on the subject, yes.

Q. And it is a fact, isn't it, this particular letter was drafted after counsel was consulted—talked with counsel, or the actual drafting of the letter by Pickering counsel?

A. That I can't remember, I expect it was drafted by counsel, because the counsel was familiar with the terms of the policy in that respect.

Q. I will read the letter dated February 28.

“Gentlemen:

“You have been appointed respectively appraisers under policies of insurance held by Pickering Lumber Corporation, with respect to which a loss occurred on July 7, 1945. Although the appointment by Pickering Lumber Corporation is subject to the express reservation of its rights under the policies more particularly set forth in its appointment, nevertheless for the purpose of protecting our rights and not in derogation thereof, you are hereby notified that demand is made by Pickering Lumber Corporation of notice of the time and place of the hearing which may be fixed by you

(Testimony of Frank Momyer.)

in connection with the appraisement. Such a hearing is hereby demanded by Pickering Lumber Corporation at which Pickering Lumber Corporation shall have full opportunity to be heard and to present all evidence on its behalf.

“To assist you in furnishing to Pickering Lumber [68] Corporation notice and opportunity to be heard, we call your attention to the fact that although our office and principal books of account are kept at Standard, Tuolumne County, California, Messrs. Robinson, Nowell & Company, certified public accountants, Crocker Building, San Francisco, California, are in possession of audit reports, working sheets and other detailed data comprising our claim. Mr. Paul V. Barnett of the firm of Watson, Ess, Barnett & Whittaker, 15th Floor, Dierkes Building, Kansas City, Missouri, has been in consultation with us for the past 17 months since the date of the fire, and desires to present facts and other evidence relating to the amount of our loss and accordingly in order to enable him to effect proper transportation reservations, it will be greatly appreciated if you will arrange to have the hearing at a time and place convenient to all parties, particularly so as to enable Mr. Paul V. Barnett to make the necessary arrangements to come to California for that purpose.

“Signed, Very Truly Yours, Pickering Lumber

(Testimony of Frank Momyer.)

Corporation, By Ben Johnston, President, and F. F. Momyer, Treasurer."

Q. (By Mr. Levit): Now, you received a reply to that letter, Mr. Momyer. I will ask you if you recall receiving the original of the letter that I now hand you from Mr. Maloney dated March 4, 1947?

A. Yes, sir, I am sure I received that letter. [69]

Mr. Levit: I suppose, counsel, we might as well use the copy, unless you have the original handy.

Mr. Whittaker: I haven't any objections to it. I have seen the copy of it.

Mr. Levit: We will offer this letter of March 4th in evidence.

The Clerk: Plaintiff's Exhibit O.

Mr. Levit: It is from Mr. Maloney to Pickering people. It says:

"Gentlemen:

"Your letter of February 28th regarding fire loss appraisal at hand.

"You may be assured that plenty of notice will be given you for the purpose of presenting your evidence in the loss which occurred July 7, 1945. As to Mr. Barnett coming to California, I would say that as soon as Mr. Anson Herrick and myself can agree upon a third party, we will set a date.

"Hoping that this meets with your approval, I am,

"Yours very truly, Frank Maloney."

Now, you also received, did you not, under date

(Testimony of Frank Momyer.)

March 21st, the original of this letter I now hand you addressed to the Pickering Lumber Corporation and signed on behalf of all three of the appraisers, by Mr. Herrick?

The Court: What is that date? [70]

A. March 21, yes, we received this letter.

Mr. Levit: We ask it be marked Plaintiff's Exhibit P.

The Clerk: Plaintiff's Exhibit P in evidence.

Mr. Levit: This is a letter to Pickering Lumber Company.

"Gentlemen:

"This is to advise you that the hearing in the matter of the appraisal of the business interruption loss claimed to have been sustained by your company as a result of a fire on July 7, 1945, has been set for 10:00 a.m., Wednesday, March 26, 1947, in San Francisco at a location yet to be determined.

"Faithfully yours, Frank Maloney, Anson Herrick, Louis Lilly, Appraisers and Umpire. By Anson Herrick, Appraiser."

You will note that carbon copies went out to Frank Maloney, Louis Lilly and Mr. Herrington, George Herrington, who counsel stated was representing Pickering at the time, and then at the bottom of the letter is typed, and I quote:

"The meeting will be held in the meeting room of the offices of Orrick, Dalquist, Neff, Brown & Herrington, Financial Center Building, corner California and Montgomery Streets."

(Testimony of Frank Momyer.)

Mr. Levit: I assume it will be stipulated, counsel, that that postscript was on the letter at the time it went out?

Mr. Whittaker: Yes.

Mr. Levit: We now offer in evidence with that identification — and I presume by stipulation, counsel?

Mr. Whittaker: You mean the one you hold in your hand? [71]

Mr. Levit: A letter dated March 21st, the same date as the other letter, and addressed to all of the insurance companies, attention of Mr. Withers, Fire Company Adjustment Bureau, and reads precisely the same as the one just introduced, as Plaintiff's Exhibit P, we ask that be marked in evidence.

The Clerk: Plaintiff's Exhibit Q in evidence.

Q. (By Mr. Levit): Now, Mr. Momyer, a hearing actually was held by the appraisers, which hearing started on March 26, at 10:00 o'clock in the morning, and ran more or less all that day, and continued—was held again on March 27, the following day, do you recall that?

A. Yes, I believe so.

Q. You were present at both of those hearings, weren't you? A. Yes, sir.

Q. Now, in addition to yourself, and the three appraisers, Mr. Johnston, who was chairman of the board of directors of Pickering, was present, is that correct? A. Yes.

(Testimony of Frank Momyer.)

Q. Mr. Paul Barnett, your counsel from the Middle West? A. That is correct.

Q. And Mr. George Herrington of the local counsel, Mr. W. H. Thomas, mentioned this morning in connection with the report on the log-degrading?

A. That is correct, yes.

Q. Mr. Jones of Standard, your sales manger?

A. Correct.

Q. Mr. Lucas of Robinson, Nowell & Company, certified public accountants for Pickering?

A. That is correct.

Q. And Mr. Withers, and Mr. Ball representing the insurance company? A. Correct.

Q. Mr. Frank Barker, who was an accountant, who was acting for the insurance company?

A. Correct.

Q. Mr. Kurt, a witness called by Pickering?

A. Correct.

Q. Mr. LeMoffatt, also mentioned this morning in connection with the log depreciation?

A. Yes.

Q. Now, do you recall that at the commencement of that hearing, Mr. Herrington submitted or read a memorandum of procedure to be followed by the appraisers?

A. That Mr. Herrick read a memorandum?

Q. Yes, the procedure that was to be followed.

A. I can't say that I remember that definitely, Mr. Levit.

Q. Well, you do remember, do you not, Mr. Her-

(Testimony of Frank Momyer.)

rick on behalf of the three appraisers outlining the purpose of the hearing and to inform the appraiser and umpire all the data they should take up and consider, the U. and O. loss in connection with the policy?

A. I believe he made a verbal statement at that time, yes, sir.

Q. And do you recall that he also pointed out that the appraisers would not necessarily restrict considerations to the data originally presented at the hearing, but they would feel free to ask for such additional data from either side, they might need and get any other information, from sources they determined appropriate.

Mr. Whittaker: May I ask counsel what point this is, I will admit that such a statement was made, and that nobody objected or excepted it, is that what you want?

(Thereupon a short argument was delivered to the Court by Mr. Levit.)

Mr. Levit: Then counsel, I will ask you to stipulate that at the commencement of the hearing, Mr. Herrick pointed out in the presence of all the parties I have mentioned that the appraisers would not necessarily restrict their considerations to the data originally presented but would feel free to ask for such additional data that they might desire, and also to obtain in other matters other sources of information determined by them to be appropriate.

(Testimony of Frank Momyer.)

Mr. Whittaker: Yes, I will so agree he said that, and will you agree that nobody made any exception to it or objected to it?

Mr. Levit: I will not only agree, but that was the next thing I was going to bring out. [74]

The Court: We will take a recess now and meet at 9:30 tomorrow morning.

(Thereupon an adjournment was taken in the above-entitled case to tomorrow, Thursday, June 9, 1949, at 9:30 o'clock a.m.) [74A]

Thursday, June 9, 1949

The Clerk: The case of American Insurance Company vs. Pickering Lumber Company, for further trial.

Mr. Levit: Your Honor, the Clerk spoke this morning in regard to the length of trial still to come. While I am not, of course, certain as to what counsel is planning, I will say that I am prepared to accept his suggestion and stipulate that the deposition of Mr. Herrick be put into evidence. I can think of no other way that we can shorten the matter.

The Court: I do not wish to require to shorten the matter.

Mr. Levit: I realize you are not requiring us to shorten the matter, but I am willing to stipulate to that.

The Court: If you would prefer to call Mr. Her-

rick, Mr. Maloney, and Mr. Lilley, you can do so.

Mr. Levit: My stipulation will run to the three of them, that we put in their depositions.

Mr. Whittaker: In lieu of the production of the witnesses?

Mr. Levit: Yes. Of course, it will be understood that we are not thereby intending to waive our objections to the competency, relevancy, or admissibility of the testimony.

The Court: That's right, but I do not want you gentlemen to understand that you are in any way being jeopardized by rushing the case through. I want you to put in your testimony in the best way you see fit.

Mr. Whittaker: At the pre-trial conference I made the [2] suggestion with this objective in mind, the one objective of economy of time, and I believe that with men of the character of these men there would be no further facts elicited or developed than were developed by the depositions; because men like these men are not going to change their stories. We all know that, and therefore I thought we would be unnecessarily burdening the Court to require your Honor to hear in the flesh the testimony they had already given. I accept the offer of the stipulation counsel just now made. It will save a considerable amount of time.

Mr. Levit: Then, I will ask at this point in order to avoid confusion in the record that we now proceed the exhibits appropriately so that there will

be no confusion, and that they will have the same numbers.

Mr. Whittaker: I say further to your Honor it would have been necessary, and it has developed, to offer the deposition of Mr. Maloney at all events, because, though he is under subpoena, he has left the city and is in Washington, D. C., and his office cannot tell us just when he will be back. He is out of the jurisdiction of the court. That we learned yesterday morning. I wanted your Honor to know about that.

Mr. Levit: The deposition will be marked, of course. I don't know that it is necessary to mark it as an exhibit. Other words, both counsel have agreed that it will be agreed by the court as in evidence, as though the witness were called [3] and testified just as he did in the deposition.

The Court: It does not make any difference.

Mr. Levit: We assume it may be deemed read?

The Court: Yes, it is in evidence anyway, in one way or another.

Mr. Whittaker: Might I inquire in that connection, since Mr. Levit has said it will be assumed or deemed that these depositions were read, we are glad to read them if your Honor would like us to do that.

The Court: It will take time to read them here, but I will do whatever you gentlemen desire. It seems to me in your arguments you could refer to them.

Mr. Levit: I suggest we be given a little time

to think over the matter of the reading of the depositions. We ought to get through with the witnesses we have here in court and call them, and then if either of us wishes to read the depositions, we can do that.

The Court: Yes.

Mr. Levit: In order not to confuse the record I am going to run down the list of exhibits of each of these depositions and note whether it has been already marked and introduced and if not, see that it gets an appropriate number.

Mr. Whittaker: You are about to do something that I think is not correct. You mean now to re-number the exhibits to the deposition that are already numbered in the depositions? [4]

Mr. Levit: Certainly.

The Court: They are in evidence now and counsel wants to get the right numbers in evidence.

Mr. Levit: Certainly.

The Court: You have Plaintiff's Exhibit C attached to Herrick's deposition.

Mr. Whittaker: I don't wish to object, but mention this so we can keep it straight.

Mr. Levit: I think we can keep it straight very easily. Defendant's Exhibit No. 1 is a copy of a letter dated April 4, 1947, from Mr. Withers to Mr. Maloney and Mr. Herrick. Is that here? If not, I will furnish a copy.

The Clerk: Yes, that is Defendant's Exhibit 1 of the deposition.

Mr. Levit: We ask that be marked Defendant's Exhibit next in order.

The Clerk: Defendant's Exhibit No. 4, a letter of April 4, 1947, from Withers to Frank Maloney and as contained in the Herrick deposition.

The Court: So ordered.

(Whereupon letter of April 4, 1947, from Withers to Maloney was received in evidence and marked Defendant's Exhibit No. 4.)

Mr. Levit: Defendant's Exhibit No. 2 in the Herrick deposition has already been introduced in evidence as Plaintiff's Exhibit D. [5]

The Clerk: That is the proof of loss.

The Court: So ordered.

Mr. Levit: Defendant's Exhibit 3 you have there, counsel. It has not yet been marked. We ask that defendant's exhibit 3 be marked defendant's exhibit No. 5.

The Court: That is the Baker report.

Mr. Levit: That's right.

(Whereupon the Baker report marked Defendant's Exhibit 3 in the Herrick deposition was received in evidence and marked Defendant's Exhibit No. 5.)

Mr. Levit: Now, No. 4 is the brief of the Pickering Lumber Company filed with the appraisers, which has not yet been introduced in evidence, and we ask it be marked Defendant's Exhibit No. 6.

The Court: Yes.

The Clerk: It was Defendant's Exhibit 4 of the deposition and is now marked Defendant's Exhibit 6 in evidence.

The Court: So ordered.

(Whereupon the brief of the Pickering Lumber Company marked Defendant's Exhibit 4 in the deposition was received in evidence and marked Defendant's Exhibit 6.)

Mr. Levit: Defendant's Exhibit No. 5 in the Herrick deposition is already in evidence as Defendant's Exhibit No. 3. That is the Withers brief that was filed with the appraisers.

The Clerk: That is correct. [6]

Mr. Whittaker: Right here, your Honor, may I ask leave to withdraw the Defendant's Exhibit No. 3 and substitute Defendant's copy of No. 3 in the record?

Mr. Levit: No objection.

The Court: All right, so ordered.

Mr. Levit: Now, your Honor, we have offered in evidence as Exhibit F the award of the appraisers and I think, Mr. Clerk, if you will look at Defendant's Exhibit 6 attached to the Herrick deposition you will find it is a copy of the award, perhaps a photostat and a letter with it.

Mr. Whittaker: A letter of transmittal.

Mr. Levit: Or, it may be that is copied into the record—it is.

Mr. Whittaker: No, it is attached as an exhibit or copied at the end.

Mr. Levit: May I ask then that the Defendant's Exhibit No. 6 be attached to Plaintiff's Exhibit F as a part thereof?

Mr. Whittaker: They are the same instrument, though.

Mr. Levitt: Yes, except that in the deposition the transmittal letter to Pickering was included and that is all.

Defendant's Exhibit No. 7 on the Herrick deposition is a so-called finally revised computation which I believe the Clerk has, and we ask that it be marked Defendant's Exhibit No. 7, is that correct?

The Clerk: Yes, Defendant's Exhibit No. 7 in evidence. [7]

(Whereupon Defendant's Exhibit 7 in the Herrick deposition, revised computation, was received in evidence and marked Defendant's Exhibit No. 7.)

Mr. Levit: Turning to the Herrick deposition No. A is not yet in evidence and I will ask the Clerk if he has that letter separately. It is a letter dated May 14, 1947.

The Clerk: Yes, I have it.

Mr. Levit: From Mr. Herrick to Judge Barnett?

The Clerk: Yes.

Mr. Levit: We ask that be marked Plaintiff's Exhibit R.

The Court: So ordered.

(Whereupon letter of May 14, 1947, Herrick to Judge Barnett, was received in evidence and marked Plaintiff's Exhibit R.)

Mr. Levit: Exhibit B in the Herrick deposition is a letter dated March 1, 1948, from Mr. Herrick to Judge Barnett. That will be Plaintiff's Exhibit S?

The Court: So ordered.

(Whereupon letter of March 1, 1948, Herrick to Judge Barnett, was received in evidence and marked Plaintiff's Exhibit S.)

Mr. Levit: Plaintiff's Exhibit C in the Herrick deposition is not yet in evidence. Do you have that, Mr. Clerk? That is headed, "Notes Relating to the Hearing of the Matter by the Appraisers." That is copied into the deposition commencing [8] at page 115, and we ask that be considered Plaintiff's Exhibit T.

The Court: So ordered.

(Whereupon document referred to above, formerly Plaintiff's Exhibit C in the Herrick deposition, was received in evidence and marked Plaintiff's Exhibit T.)

Mr. Levit: Plaintiff's Exhibit D attached to the deposition is entitled "Draft Memorandum of Procedure." We ask that it be marked Plaintiff's Exhibit U.

The Court: So ordered.

(Whereupon document referred to, formerly Plaintiff's Exhibit D, was received in evidence and marked Plaintiff's Exhibit U.)

Mr. Levit: Exhibit E attached to the deposition is a memorandum dated May 2, 1947. That is not yet in evidence and we asked that be marked Plaintiff's Exhibit V.

The Court: Whose memorandum is that?

Mr. Levit: Mr. Herrick's memorandum.

The Court: So ordered.

(Whereupon memorandum referred to, dated May 2, 1947, was received in evidence and marked Plaintiff's Exhibit V.)

Mr. Levit: Exhibit F attached to the deposition is a blue cover document being a summary of differences between the original claim and the insurance company's position as originally stated to the appraisers, prepared by Mr. Herrick, and we [9] ask that it be marked Exhibit W.

The Court: So ordered.

(Whereupon document prepared for appraisers by Mr. Herrick, formerly Plaintiff's Exhibit F, was received in evidence and marked Plaintiff's Exhibit W.)

Mr. Levit: I think the only other exhibit referred to in any of the depositions or attached to any of the depositions is a reference in Mr. Maloney's deposition, Exhibit No. 1, and that document has already been introduced in evidence as Exhibit No. 7.

The Court: Defendant's Exhibit No. 7?

Mr. Levit: Yes, Defendant's Exhibit No. 7.

The Court: Defendant's Exhibit No. 7 is the finally revised computation?

Mr. Levit: That's right, that is the document that was referred to in Mr. Maloney's deposition and was attached as an exhibit in that deposition. I think that covers the matter of the exhibits.

The Court: I understand these depositions are admitted in evidence with the right of counsel to object to the materiality, relevancy and competency of them.

Mr. Levit: Yes, the same point I made as to the opening up of this award at all.

Mr. Whittaker: Mr. Clerk, Mr. Maloney's deposition has not been filed. It has just now been filed and may now be filed. [10]

Mr. Levit: It will be stipulated, of course, counsel, that the lack of notarization will be waived.

Mr. Whittaker: That is presently agreeable. It has not been notarized.

Mr. Levit: There was only one of those exhibits that we did not have in proper form. I am just trying to remember which one it was, the one we had to rely on the deposition for.

Mr. Brown: Exhibit C of the Herrick deposition.

The Court: That is the one you said was copied in the deposition on page 115?

Mr. Levit: That is the one. I just wanted to make a note of that.

Now, your Honor, I would like to offer in evidence at this time for such help as it may be to the Court, a tabulation which we prepared showing a comparison in three separate sets of columns of the amounts claimed in the proof of loss, amounts which

Mr. Pickering computed for the insurance companies as being proper and of the relative amounts set out in the award or used by the appraisers in arriving at the award. Now, I gave a copy of this counsel last night. I may say that in order to make it perfectly clear that this is merely intended as a summary. It is in the nature of the same kind of document as Exhibit No. 7, which is Mr. Herrick's finally revised computation in which he attempts to make the comparison between the claim and the award. That document runs to four pages and this [11] is a simple breakdown for convenience sake in a single sheet which will be of help to everyone concerned. It is not offered to establish anything in the way of proof, but only for the assistance of the Court as an illustration that we prepared to show the comparison between these amounts.

Mr. Whittaker: Now, if it please the Court, we object to it for this reason—it is wrong. It recites figures which it says are found on our proof of loss which are not there. A number of them in the very beginning, you see, for example, our proof of loss shows trade and company use 37,251,575 feet and unit cost of 3.30021 and a box factory footage of 60,356,359, and a unit cost of 15.07780. You will find no such figures in our proof of loss. We show the overall received less the expenses in a round figure.

Mr. Levit: Counsel, I want to be perfectly fair about this. I don't want any misconception of what this is intended to show. If necessary I can estab-

lish these points from Mr. Momyer as to the makeup of the claim. It might well be true, as counsel says, that some details of those figures don't appear in the proof of loss itself, but at any rate they are the figures that were used in arriving at the Pickering claim. The total Pickering claim shown by the proof was \$742,004.41, and that was made up of the items shown up above. As I say, this is not intended to establish as a fact any of the items stated herein. Counsel is perfectly free to argue about them or to prove that the figures were different or that this is not a fair statement. What we tried to do in it, and I think it will be very helpful to the Court, and we are certainly going to use it in argument to set up the columns for the Court's convenience and ready method of comparison for the Court's convenience.

The Court: I don't think it is properly admissible as an exhibit unless you stipulate to it. I see your purpose, which is just to advise me of the differences between the original proof of loss, the original claim, and the amount of the award.

Mr. Levit: That's right, and we will bring Mr. Momyer to the stand and show the makeup of the claim, and we can offer them in evidence as a summary.

Mr. Whittaker: I make this point that our proof of loss speaks for itself.

The Court: I have already ruled I wouldn't admit the document. There is no use in arguing.

Mr. Levit: I will asked it be marked for identification as Plaintiff's Exhibit next in order.

(Whereupon tabulation prepared by Mr. Levit was marked Plaintiff's Exhibit X for identification.)

The Court: Gentlemen, we have a 10:00 o'clock calendar that we must call at this time.

(Recess.) [13]

FRANK MOMYER

recalled as a witness for the defendant, previously sworn.

Mr. Levit: Your Honor will recall that yesterday on cross-examination of this witness I asked him certain questions with regard to standard accounting texts and practices shown thereby. The objection was made and your Honor felt that the line of questioning was not proper. I did not therefore pursue it further pending an opportunity to present authorities to your Honor which I can do very briefly now.

On the subject of cross-examination of an expert by the use of a textbook, the case of American Pacific Whaling Company vs. Christenson, a case from this circuit, the Ninth Circuit, decided in 1937 by the Court of Appeals recorded in 93 Federal 2d, page 17, says this, and I quote from page 21:

"Passages from textbooks were read to a witness on cross-examination. Defendants assigns this as

(Testimony of Frank Momyer.)

improper. This was permissible to test the knowledge, accuracy and credibility of the witness."

McBane's California Evidence, Manual 1945 on page 294 states:

"Cross-examination reference to learned treatises. On cross-examination of a witness he may be asked about his familiarity with authoritative printed works on the subject and this may be done, seemingly, although he has not relied on the particular book in giving his evidence on direct examination."

The general rule is stated in American Jurisprudence in this way:

"There is a distinction between the use of medical or other scientific books or treatises in the direct examination of expert witnesses and use for the purpose of cross-examination. If it appears that the expert witness is basing his opinion in whole or in part on authority of medical or other scientific works, counsel may in cross-examination interrogate the witness or cross-examine for the purpose of discrediting him."

There is an early California case which says where a medical expert took the stand and merely said, "This is my opinion," that it would not be permissible to examine him with respect to textbooks to the contrary, although in that case the Court pointed out that it did not find anything contrary in the books to what the witness had testified to so that there was another ground on which the case went, and that was quite an old case and we have

(Testimony of Frank Momyer.)

been unable to find any later authority except McBane who states the rule to the contrary.

I also call your Honor's attention to the Federal Rules of Civil Procedure, Rule 43, from which I read:

“(a) Form and Admissibility. In all trials the testimony of the witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under [15] the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction in the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made.”

If your Honor will refer to the notes of the Supervisory Committee in connection with that rule, the note to that subdivision reads as follows:

“The first sentence is a restatement of the substance of the United States called Title 28, Section 635 and 637. . . . The second and third sentences on admissibility of evidence and Subdivision (b) on contradiction and cross-examination modify United States Code Title 28, Section 725 insofar as that statute has been construed to prescribe conformity to state rules of evidence.”

(Testimony of Frank Momyer.)

In other words, under Rule 43 the Federal Court will follow the rules of federal jurisdiction rather than relying on the state of rules; and it is obvious from Rule 43 that the tendency of the Court is to give a liberal scope to the cross-examination. [16]

The Court: As a matter of fact, didn't you read from the book?

Mr. Levit: Yes.

The Court: I said I wanted to hear about it anyway.

Mr. Levit: But I did not pursue it as far as I intended because of your Honor's opinion of the law.

The Court: I will reverse my opinion and you may proceed.

Cross-Examination
(Resumed)

By Mr. Levit:

Q. Mr. Momyer, you are familiar, are you not, with the work by Montgomery entitled "Auditing Theory and Practice"? A. Yes, sir.

Mr. Whittaker: If it please the Court, may I make this objection to this line of testimony? This is seeking or leading to theories upon what text writers have said with respect to accounting principles, which as applied to the case at bar relates solely to questions of law and therefore would be argumentative with any witness and invading the province of the Court.

(Testimony of Frank Momyer.)

Mr. Levit: May I make just a brief comment on that?

The Court: It may or may not be true. I want to admit the evidence on this point anyway, because it seems to me that in determining what loss or profits are, you have got to adopt certain theories. They are inherent in the question just as in the question of determining the value of a piece of property, [17] which is a matter of opinion. In the same way when you determine what the profits are, you must adopt a certain test, and if you adopt one theory of accountancy we may be passing on a question of law, but it seems to me when you appoint appraisers to determine what profits are, you certainly expect them, and it is implicit in the appointment of them that they will have to adopt some theory of accountancy.

Mr. Whittaker: I do not disagree with that, but what I am saying is that when we get to the matter of discussion of law that the courts have already faced that matter by judicial decision. That is what I am saying.

The Court: That may be.

Mr. Whittaker: Counsel made that statement yesterday that there was not a single case in our brief submitted to the court that touched that question. Your Honor, that was a brief on the law of appraisal. I have one here now that covers these matters that I propose to submit at the conclusion of the trial.

(Testimony of Frank Momyer.)

Mr. Levit: If this question were submitted to the Court, and had there been no appraisal and the parties could not get together, there is not any doubt but that the Court would have to decide what accounting rule, in order to determine the proper allocation of profit and so forth. But this was not submitted to the Court. It was submitted to the appraisers and the only question is to find out whether the appraisers decided in accordance with established and recognized principles, or if they did [18] not.

If counsel says principles of accounting are established by decisions of law, he is mistaken. The only decision he has recited with regard to the allocation of profits is a decision entirely in favor of the method adopted by the appraisers; but we will argue that at another time.

The Court: It seems to me that all the appraisers can do is to determine a question of fact; but when you determine a question of how much profit you have made, it is implicit that you have to take into account some form of accountancy.

Mr. Whittaker: That's right, in the memorandum of four pages Mr. Withers in evidence as Defendant's Exhibit No. 3, that tells the appraisers that as respects questions of law they are to compute the facts each way so that the question of law can be determined otherwise. They are not to resolve questions of law.

There is one more observation I should like to

(Testimony of Frank Momyer.)

make to your Honor in this connection. Counsel for plaintiff has stated yesterday frankly and in a lawyer-like manner that in the determination of profits you must have actual realizations, and of course, that is the law.

Mr. Levit: I did not say that, counsel.

Mr. Whittaker: I so understood you.

Mr. Levit: I said it was an accepted principle of accounting that normally books should not reflect a realization [19] of profit that has not yet actually been received. I did not say it was impossible in accountancy to determine profit or allocate profit between different departments of a business without first selling——

The Court: Of course, this is a situation where you haven't anything to sell. You have to determine what your profit would have been if you had been able to operate.

Mr. Whittaker: That is true as to profits generally, but as to the box factory it was all sold, and we know what the realization was there, 62.20 a thousand, and we are talking about the realization of profit from the box factory.

The Court: That is right.

Mr. Levit: No, we are talking about the allocation of profits on what went through the box factory as between the box factory operation and the other operation.

The Court: I understand. I am going to allow this line of questioning, and it may be deemed, counsel, that you have an objection to all of it.

(Testimony of Frank Momyer.)

Mr. Whittaker: Thank you, your Honor.

Q. (By Mr. Levit): I call your attention to page 436 of that work from which I am going to read briefly.

The Court: What is the name of that work?

Mr. Levit: "Auditing Theory and Practice (6th Edition, 1940; Ronald Press)" by Montgomery, and I am reading from page 436: [20]

"Interdepartmental Profits. In departmental accounting the practice may be followed of passing the completed product of one department of the business to another department for further processing at a so-called selling or current market price. To the extent that the market price is in excess of cost, a profit is taken into account immediately.

"The primary purpose of passing products between departments for progressive processing at the current market price at the stage of completion is to show departmental results on an independent basis. . . .

"The practice of charging separate departments of a business with market rather than with cost prices may be good departmental accounting, but the interdepartmental profits should not be reflected in the statement of income for the business as a whole until the product is finally sold."

Q. It is a fact, is it not, Mr. Momyer, that is precisely the method that was followed by Pickering in connection with its own accounting?

A. With the interdepartmental or for manage-

(Testimony of Frank Momyer.)

ment purposes, but not for calculation of true profits.

Q. Certainly, just as Montgomery says, when you came to making up your statement as a whole, you didn't reflect any departmental profits at all; you only reflected the ultimate profit, didn't [21] you? Right? A. Right.

Q. On page 159 with reference to allocation of costs based upon sales, Montgomery says:

"When more than one product is obtained from the same raw material, arbitrary methods must sometimes be used to apportion the cost to several products."

Do you agree with that?

A. I don't say that I do.

Q. You don't think that you do?

A. No, sir, not when as stated yesterday that it is quite evident from the facts that lumber selling for \$100 a thousand and lumber selling for \$50 a thousand, it just is not true the \$100 lumber cost just twice as much as the \$50 lumber.

Q. Let me read to you, further, what Montgomery says:

"The proceeds of the sale of by-products are usually applied against the cost of production of the main product. In some industries, for example, lumber, in which products of more than one grade are obtained by a common operation, the cost allocated to any one grade is more or less arbitrary. It is regarded as good accounting practice to assign

(Testimony of Frank Momyer.)

higher costs to more valuable products and lower costs to less valuable products, even though the apparent cost of production units may appear to be the same." [22]

Do you agree with that statement?

A. No, I do not, for the same reasons stated before. In the first place, the box factory is not a subsidiary operation to the lumber operation. All we do is just cut the big boards into smaller boards and package them and ship them out so that they can be made into boxes. We don't make the boxes at all. We just saw the big boards into little boards and that is just a further processing along the line and it is not a finished product until it is loaded on the cars and shipped as shook or the big board as lumber. There is no by-product involved.

Q. No by-product, but it is the joint product situation rather than the by-product?

A. That is correct.

Q. That is what Montgomery is speaking about, the joint product accounting method of allocating costs when he is talking about the lumber industry, isn't he?

A. No, sir, I think he goes farther than that. He talks about by-products and so forth. Some operations have by-products that we don't have. They make something out of the bark or make something out of the sawdust, maybe. They make these bricks that are sold for fuel. There are various by-products that might be made in the mills,

(Testimony of Frank Momyer.)

but we are talking about a product that is made from boards and there is no difference between the big board and small board except you saw them smaller.

Q. Even though you don't agree with Mr. Montgomery that it is good accounting practice to use an allocated cost in such cases as the lumber industry, you do agree, do you not, that the United States Government Treasury regulation with reference to income tax matters recognizes the allocated cost method and that Pickering was required to use it in connection with the pricing of his own inventory?

A. For income tax purposes, yes, sir.

Q. All right.

A. And I call your attention to the fact that if you are talking about allocated costs on the true basis of allocated costs, then in our case the allocated cost to the box factory would be much higher than the average cost that we have claimed in our claim because the product sells for more as box shooks than as the big boards in lumber, so you would allocate the higher cost to the——

Q. Well, we will come to that. But at the moment I would like you to refer to the question on determination of cost as compared with the determination of market.

In Montgomery's book on page 160 under the title "Vagueness of term 'Cost'," he states:

"We refer to 'single cost' as if it were an exact term and not to be compared with the illusive word 'market.' Yet experienced accountants often find

(Testimony of Frank Momyer.)

it more difficult to determine costs than to determine market, [24] even when all factors are known. Except when specific identifiable purchased units are on hand, it is necessary to make some assumption in determining the cost of the items comprising the inventory. The essential point which the auditor must always keep in mind is that though one procedure is sacrosanct, any accepted method which clearly reflects income in any business or industry is a proper method.

Do you agree with that statement?

A. I think so, and certainly the method that we use is as much accepted as the allocated cost method.

Q. Now, I refer you to a book entitled "Introductory Cost Accounting," by Gillespie, which was published by the Ronald Press in 1941, the revised edition being published in 1941.

It is true, is it not, that the Ronald Press is recognized as being a publisher of textbooks and recognized works on accountancy?

A. Yes, and many other subjects.

Q. They published the Montgomery book, as a matter of fact, did they not, do you know?

A. I think that is correct.

Q. Now, referring to page 268 of that book, I am going to ask you if you agree with this statement:

"Distributing cost prior to split-off: value basis. In distributing cost to point of split-off, some basis should be selected which will charge each of the

(Testimony of Frank Momyer.)

joint products with an equitable share of cost. One common basis is 'market value of the products.' Under this basis, cost prior to split-off is distributed according to value of finished product yielded."

You agree that is one method of determining cost?

A. They are talking about interdepartmental procedure; we have talked about here as being primary for management purposes to see whether they should cut off some portion of the manufacturing because it is not making money for them.

Q. As a matter of fact, Mr. Montgomery says that is a recognized method of determining the cost of the production of a joint product such as lumber, does he not?

A. I don't remember what Mr. Montgomery says.

Q. Isn't it a fact that aside from the fact that Pickering itself did this in pricing its own inventory at the insistence of the Federal Government, that that is common practice in the lumber business?

A. No, they didn't say it was common practice, as I recall. The way that happened, counsel, if you are interested, is that the agent continuously read my Prentiss-Hall books on tax matters and he ran into a case in Los Angeles, I believe it was, where they asked allocated costs be used. The book did not give the history of that case, and he jumped at the idea that all lumber accounting should be on that basis for income tax purposes. But [26] the

(Testimony of Frank Momyer.)

truth of the matter was that the man had been told that because he was not using any method of cost where he got to a point where the market value was less than cost he would use that. Where it was higher he would use cost. He was not following through on any procedure and in that particular case he was told to use an allocated cost. The agent didn't go into that and he took that cue to say all lumber accounting should be done on that basis and he took the position that he was not going to settle our case unless he did that. But I don't understand that all lumber accounting was on that basis. In other words, he was up there a long time before he discovered this case in the book and he didn't say a word about allocating the cost until he had read that and he discovered in that case they had used allocated cost, and if it had been commonly used in the lumber business he would have known that without stumbling on it in the textbook of Prentiss-Hall.

Q. You deny, Mr. Momyer, that it is universal or it is the common practice in the lumber business in costing products on remanufacture operations to cost them in at market?

A. I do not. I have repeatedly said we do it for management purposes and most of them do, but they washed it out when they came to profit and loss statements as we do.

Q. Certainly, because when they make up their profit and loss statements they do not make any

(Testimony of Frank Momyer.)

distribution of accounts as between departments, do they? [27] A. Certainly not.

Q. And it is true, is it not, that during the O.P.A. period, that is the period while the O.P.A. prices were in effect, that it was the universal practice in the lumber business in costing products into remanufacturing operations such as box factories, to do that at the O.P.A. ceiling price?

A. I do not admit that the box factory is a remanufacture operation on the basis we conduct it.

Q. I will withdraw the question. Do you deny that during the period the O.P.A. was in effect, it was universal practice in the lumber business, or at least the very common practice to cost lumber into a box factory where the lumber was produced by the same mill at the O.P.A. prices to determine market value or value-in-place?

A. I can't say that I know it was generally used, that O.P.A. prices were generally used. I know one of our neighbors that uses just an arbitrary basis. I expect that a number of companies would use that basis for the same reason we did for telling whether that department was profitable to operate or not.

Q. You spoke of the fact that the revenue agent made use of one of your textbooks written or published by Prentiss-Hall. Prentiss-Hall, of course, is also like the Ronald Press recognized as a publisher of reliable accounting books and other technical service? [28]

(Testimony of Frank Momyer.)

A. They sell you a service that gives you tax information.

Q. It is a fact, is it not, that this question of making up an operating statement, or even a balance sheet for a given period, that is, a fixed beginning and a fixed ending, is necessarily a matter of estimate and not a matter of being able to say that it is completely correct, isn't that right?

A. I don't know that I understand your question.

Q. Don't you agree with this statement which I am reading from a book published by Prentiss-Hall in 1948, the name being "Principles of Accounting," by Finney, third edition, 1948:

"Periodical balance sheets and operating statements can rarely be statements of absolute fact, and therefore cannot be regarded as correct in any absolute sense. Usually they can be no more than a mixture of facts, estimates and opinions. Since accountants may honestly differ in matter of estate and opinion, different statements may be made and defended by different accountants."

Do you agree with that?

A. I would say there are certain items you have to estimate; depreciation, for instance. Nobody can measure that out in a gallon bucket and say that is it. You have to make some estimate, and one party might say one rate was applicable and another party might take another position. So to that extent there are certain estimated items; but there

(Testimony of Frank Momyer.)

are also a lot of items that are developed from actual cash expenditures, actual dollars that [29] are spent.

Q. But specifically referring to the claim that was presented by Pickering in this case against these insurance companies, there is no doubt in your mind that on the overall picture and with respect to many of the items that made it up it was a matter of estimate and not a matter of sheer factual proof?

A. You certainly couldn't have actual profits established because you didn't have any operation, but we took the best evidence that we had of the profit that would have occurred for twelve months following the fire which in this case was the preceding fiscal year, and we had ceiling prices in effect as stated yesterday, and things seemed constant throughout the entire period and it was thought by all parties concerned that would be a fair measure.

Q. When you say "was thought by all parties concerned" that the basis or theories on which you made your estimate was a correct one, you don't mean to include the appraisers and the insurance companies, do you?

A. I am using the test year that was agreeable to all concerned at the time.

Q. You mean to the insurance companies?

A. Yes, they didn't challenge the use of that test year.

(Testimony of Frank Momyer.)

Q. Oh, no, they didn't challenge the use of that test year, but in the determination of the amount of profit that the box factory made, insurance companies differed very materially with [30] your thesis on which you built your claim, didn't they?

A. I didn't mean to say——

The Court (Interrupting): He did not say they did not. He said both sides agreed on the test years.

Mr. Levit: Certainly, I am sorry; I misunderstood.

Q. Now, just one more text reference, Mr. Momyer. I am going to ask you if you agree with this statement of Mason in "Fundamentals of Accounting," published in 1942 by the Foundation Press. Are you familiar with that book?

A. Yes, I think I have read some books on that—I don't remember. Whether I have read that particular book or not, I don't remember.

Q. I will ask you if you agree with this statement on page 275:

"Conclusion as to the limitations and purposes of cost accounting.

"Limitations of cost accounting. The primary service of cost accounting is not, paradoxically, the determination of the cost of producing or distributing each unit of production or service. The prevalence of joint costs both in production and selling makes it impossible to compute the cost, in an absolute sense of any single unit. Most modern

(Testimony of Frank Momyer.)

plants produce more than one product with the same buildings, equipment and labor force. The whole problem of overhead or process cost distribution over departments, the redistribution of service department [31] costs, and the allocation of burden to particular jobs or products is characterized in large part by the use of arbitrary and crude bases.”

Do you agree with that?

A. I think that is referring to this interdepartmental procedure.

Q. Do you agree with Mr. Mason’s statement on page 277 that:

“Production costs records are necessary in order to obtain unit costs which can be used for the calculation of cost of goods sold and the value of inventories. Although never more than approximately correct, they provide a systematic mechanism for accounting for the flow of costs through the plant and on to the customers.”

Do you agree with that statement that production cost records are never more than approximately correct?

A. I don’t think they can be absolutely correct for reasons stated a while ago, that some items like depreciation must be estimated.

Q. Referring to the appraisal, you recall that there was introduced in evidence yesterday Plaintiff’s Exhibit N which was a letter written by

(Testimony of Frank Momyer.)

Pickering to the appraisers demanding a hearing, do you recall? A. I do.

Q. It is a fact, is it not, that the Pickering Lumber Company got from the appraisers a full opportunity to present all of its [32] facts, figures and arguments?

A. I believe that is true.

Q. And also to hear and to rebut the facts of the arguments presented by the insurance company? A. To rebut?

Q. To hear and an opportunity to rebut the facts and arguments presented by the insurance company?

A. We might have had the opportunity, but I don't believe we did. They presented their side of the picture and we presented ours and we went on our way and let the appraisers consider the question.

Q. As a matter of fact, had you wished to present any further evidence there is not the slightest doubt in your mind that if you had desired to present any further argument that the appraisers would have permitted you to do so?

A. I believe they would.

Q. At no time during the course of this appraisal did you ever offer or seek permission to offer or present any evidence that was in any way rejected or declined or refused by the appraisers, isn't that true?

A. We did not; that I know.

(Testimony of Frank Momyer.)

Q. At the time of these hearings that were held by the appraisers, all three of the appraisers were present, were they not? A. Yes, sir.

Q. And all of them were attentive and paid close heed to the [33] arguments on both sides and the facts presented by both sides, isn't that so?

A. I think so.

The Court: That is looking into the appraiser's mind. That calls for his opinion and conclusion.

Mr. Levit: I mean, he had no feeling that they were looking out the window or not paying attention to what the Pickering Lumber Company had to say.

The Court: I think some well-known judge has said that the hardest thing for a judge to do is to look as if he was listening and not be listening.

Mr. Whittaker: Of course, your Honor, I believe we are quite a long ways afield. All the issues here are delineated by the pleadings and those are the only challenges we make on the award.

Q. (By Mr. Levit): The appraisers, Mr. Momyer, did not actually examine the underlying books and records of the Pickering Lumber Company, did they? A. They did not.

Q. At no time during the course of the hearing or prior to the award were they requested to do so by the Pickering Lumber Company, or by the others, were they?

A. They were not requested to do so. They were

(Testimony of Frank Momyer.)

invited to come to our plant and our office and make any inspection of the books or records in the operation or do anything they wanted to [34] do. They did not, however, come to our plant.

Q. As a matter of fact, it was generally conceded by both the insurance companies and the appraisers that the figures, reports and the audits and the claim presented by Pickering Lumber Company truly depicted or that they purported to depict what was correct so far as Pickering Lumber Company books were concerned?

A. I believe it was just a different way of handling the figures.

Q. It was a question of applying different accounting theories to the figures, is that correct?

A. Yes, that's correct.

Q. Now, Mr. Herrick who was one of the appraisers and who was selected by Pickering Lumber Company to act on this appraisal is the Mr. Herrick who is a member of the firm of Lester, Herrick & Herrick?

A. That is correct.

Q. It was true at that time and also at the present time that is one of the outstanding C.P.A. firms in San Francisco?

A. I believe they are.

Q. It is also true, is it not, that Mr. Herrick's firm handles a goodly amount of lumber business from the C.P.A.'s viewpoint?

A. I am not familiar with their practice. They

(Testimony of Frank Momyer.)

do handle some lumber accounts, I am sure, but not as many as Robinson & Nowell.

Q. Mr. Lilley who was selected to be umpire in this matter, was [35] and still is a senior partner in the firm of McLaren Goode & Co., isn't that so?

A. I understand he is, yes. I met neither of these men prior to the appraisal, and I don't know much of their background.

Q. You do know, however, that McLaren Goode & Co., like Lester, Herrick & Herrick is one of the outstanding C.P.A. firms in this district?

A. I do.

Q. Are you aware of the fact, Mr. Momyer, that it was Mr. Herrick who selected and nominated Mr. Lilley to act as the umpire in this matter as his first choice?

A. I do not know personally. I have read the testimony of Mr. Herrick and I believe that statement was made but I do not know personally who they considered and who selected the umpire or how they did it.

Q. It is a fact, isn't it, do you recall, that the question of the matter of whether the witnesses should be sworn or not was brought up in the hearing and everybody present agreed it was unnecessary?

A. I do not remember that that question was asked.

Mr. Whittaker: Herrick said nobody asked they be sworn and there was no discussion about it.

(Testimony of Frank Momyer.)

Mr. Levit: So we will get the record straight on it, I will refer to Mr. Herrick's deposition on page 94, lines 19 to 23: [36]

"Q. Was any objection raised by either party at the hearing to the informal method or procedure you followed in permitting the testimony to be taken without oath?

"A. No objection was raised. I have forgotten whether or not the question of swearing the witnesses was raised. I have a very indistinct recollection that it was and that it was agreed that placing them under oath was not necessary."

Then on the next line he says:

"Frankly, my recollection isn't clear." And then he says, "It is true, is it not, that had either party requested or insisted that oaths be administered you would have so proceeded?"

"A. Certainly."

Q. (By Mr. Levit): But you don't recall whether the point actually came up, Mr. Momyer?

A. I don't believe it was mentioned, although I could be wrong. It has been a long time ago.

Q. In addition to proof of claim and your other data, you furnished the appraisers from time to time both during and after the hearing with, I believe you testified, the various Robinson-Nowell reports, that is, the reports of Pickering's auditors covering various periods at various points, isn't that so?

A. I believe they had those. We first gave them

(Testimony of Frank Momyer.)

our proof of loss and then I believe they did ask for those and we made them available to them.

The Court: We will take a ten-minute recess.

(Recess.) [37]

Mr. Levit: Mr. Momyer, I have handed you Plaintiff's Exhibit W, which is an analysis made by Mr. Herrick shortly after the commencement of the appraisal of the differences between the position taken by the Pickering Lumber Company with respect to its claim and the position taken by the insurance companies with respect to the claim. I will ask you if you ever saw that document before?

A. Yes, sir.

Q. And it is true, is it not, that the document fairly and accurately reflects the points of dispute between the two parties to this appraisal as they were presented before the appraisers, in large part?

A. I believe that is true.

Q. Now, in other words, then, there were listed on these three sheets, these three accounting sheets attached thereto, or comprising this Exhibit W, many items shown on here where the parties differed as to the details which should properly go to make up this claim, isn't that so?

A. There were a number of items, yes.

Q. Yes. And in resolving the problem presented to them, it is true also, is it not, that the appraisers did not settle all of these points of difference in favor of the insurance companies or

(Testimony of Frank Momyer.)

of Pickering, but that rather the final outcome was one wherein as to some of the differences the insurance companies succeeded and as to some of the differences the Pickering [38] Lumber Company succeeded; isn't that so?

Mr. Whittaker: If the Court please, I object to the question for the reason that it calls for an interpretation of the document in evidence.

Mr. Levit: Which document?

Mr. Whittaker: This exhibit that you are referring to.

The Court: I don't think it does, Mr. Whittaker, because he asked after that, what was the conclusion afterwards, what occurred afterwards, and what the appraisers did afterwards with respect to the various differences. He doesn't ask about the contents of that document in that question.

Mr. Whittaker: Well, it does—Then I should say, it calls for an interpretation of evidence already before the Court from the appraisers themselves as to what they did.

Mr. Levit: Your Honor, this witness has testified in detail, he was asked on direct examination about various points as to which the claim differed from the award of the appraisers. Now there is in evidence this large statement of differences, and we wish to show, and I believe in fact that counsel will stipulate to it, that in the resolution of the problem presented to the appraisers, the overall

(Testimony of Frank Momyer.)

problem of this claim, and in reaching their award, the appraisers decided some of these differences, these points of difference, in favor of Pickering and decided some of them in favor of the insurance companies. Is that not so? [39]

Mr. Whittaker: Well, in one sense, yes. In another sense, no. The facts are that the testimony of Mr. Herrick and of Mr. Maloney and of Mr. Lilly already before the Court shows precisely what they did, and I do not think it is for us now to attempt to interpolate what they did. Their testimony speaks for itself, in other words.

Mr. Levit: That is not correct, your Honor, because the testimony was largely limited to the claimed points of error on which Pickering was unsuccessful in their own view, so far as the appraisers were concerned. What I am trying to establish now is that in the overall picture,—

The Court: It resolves some of the differences in favor of Pickering and some of them in favor of the insurance company.

Mr. Levit: That's right.

The Court: Well, I think that that might be apparent from the fact anyway, and I will allow the question.

Q. (By Mr. Levit): That is correct, is it not, Mr. Momyer?

A. I have no information on everything they did, but I believe that must be a fact, but they arrived somewhere between the two figures. That is, they arrived somewhere between the proof of loss and the

(Testimony of Frank Momyer.)

figures established by the insurance companies.

Q. Well, now, as a matter of fact, you recall, do you not, that Mr. Herrick pointed out that although the determination by the appraisers of the salvage from the box factory operation distressed Pickering, that actually Pickering was allowed and set up in its claim, a considerable amount of depreciation, which, as Mr. Herrick said, could never have been sustained had the insurers made objection to it. Do you recall that?

Mr. Whittaker: Now I object to the question for the reason that it is attempting to interpolate some statement made by another witness, and trying to ascertain what he meant by that testimony.

The Court: Well, I think that the objection is good.

Mr. Levit: You sustain the objection, your Honor?

The Court: Yes, I think so.

Q. (By Mr. Levit): Now, I suppose you still have, Mr. Momyer, a copy of the proof of loss, which is Exhibit D; and I will ask you, referring to that exhibit, to tell us, please, what was the amount claimed of the total amount of profits presented based on the fiscal year, March 31st, 1945, on an annual base. A. \$358,456.56.

Q. Now it is a fact, is it not, that that figure was based on the fiscal year ending March 31st, 1945? A. That's correct.

Q. And that it is made up of two items; namely, an item of trade and company use lumber, of

(Testimony of Frank Momyer.)

\$111,840.73 and of box factory lumber, or operations, of \$246,617.83, which totals——

A. I have been unable to find that anywhere in the proof of loss, counsel. I cannot find that.

Q. I am going to show you Plaintiff's Exhibit X for identification [41] (handing to witness). I call your attention to the first series of columns headed, "proof of loss," and to the first item, "profits prevented due to loss of production," and "(annual base) (based on fiscal year 3/31/45)"—a total of \$358,456.56. This figure is the figure which you just stated was the amount of profits presented on the annual basis, is it not?

A. That is correct, but that isn't the question you asked me. You asked me about \$111,840.73 and \$246,617.83.

Q. I am asking you now to look back at the two preceding figures, which total that \$358,456.56 figure and ask you if that is not correct, that the \$358,000 figure was made up, so far as your claim was concerned—whether it appears in the printed proof of loss or from some other place that you may have taken it—of the two figures shown immediately above on Exhibit X for identification?

Mr. Whittaker: Now, if your Honor please, I would like for the purpose of the record to make the objection that counsel is attempting to interrogate this witness about an exhibit which he himself prepared and which is not in evidence and is hear-

(Testimony of Frank Momyer.)

say, and not proper for consideration here, nor for use in the interrogation of this witness.

Mr. Levit: May I reply?

The Court: Well, you can revamp your question by just asking him if that amount of \$358,000-odd wasn't made up of [42] these two sums.

Mr. Levit: That is what I asked him first, your Honor; I thought I did, anyway.

The Court: Well, you don't need to show him in a document that is not in evidence; just ask him.

Mr. Levit: Yes. I would like to point this out to your Honor, that the defendants themselves introduced in evidence on the deposition of Mr. Herrick this so-called document known as the "final revised computation," which attempts to make a comparison between the claim and the award. Now if it is proper for the defendant to do that, it is proper for us also to do the same thing, and we believe that this will be very helpful if we can do so.

The Court: I think that the Court can use it in the sense of being part of your argument.

Mr. Levit: That's right. That is all I wanted for, your Honor. But counsel won't let it in. Otherwise we could have foregone this question.

The Court: Whether it is admissable in view of their objection and their claim that it is inaccurate, of course I couldn't admit it, because there is no foundation laid for it.

Mr. Levit: Well, in order to shorten this, I will abandon this line of questioning, and will use this in argument.

(Testimony of Frank Momyer.)

Mr. Whittaker: I want to state now for the record, I have [43] no objection whatever of his asking the witness concerning any figures he desires to ask him. My objection goes to the point of his attempting to show the witness an exhibit which he prepares and which I have stated to your Honor earlier we find not to represent the facts with respect to the figures contained in the proof of loss.

The Court: Well, of course, he is attempting to bring out the fact that they do represent the fact contained in the proof of loss.

Mr. Levit: That's right.

The Court: And while it may be improper for him to show the witness a document that is not in evidence, on the other hand he can ask him about the figures in that document.

Mr. Whittaker: That is right.

The Court: In other words, there is a sum of \$358,000 made up of two other sums; one sum the witness has already admitted.

Mr. Whittaker: The total.

The Court: The total he has admitted, and haven't you admitted the one of those figures, the subsidiary figures?

The Witness: No, I have never seen either of the two figures there. I don't know where they came from. I can't find them in the proof of loss or anywhere. This column is headed proof of loss, and I can't find it anywhere in here (indicating).

Q. (By Mr. Levit): Well, at any rate, it is

(Testimony of Frank Momyer.)

correct, is it not, [44] that in arriving at the figures of profits prevented of \$358,000-plus, you calculated the amount of profit to be made on the trade and company use in one category and the profit normally to be made in a year on the box factory use in the other category, didn't you?

A. Well, we will put these sales all together here, the schedule is set forth on page 3 here, where the sixty-six eight-six came from which produces the \$358,000. But I cannot find any identification for these two figures. We have the sales here from the box factory and the lumber.

Q. All right. Then you can't identify the detail making up the \$358,000?

A. No, I don't find it in the proof of loss anywhere.

Q. All right. Now coming down to the next item in the claim column, the total of the fixed charges of the profits prevented—I am sorry—the next item in the claimed column is the amount of fixed charges and continuing costs on an annual basis projected from the actual nine months after the fire. That amount was, was it not, \$646,190.47?

Mr. Whittaker: I object, for the reason that he is again referring to columns in this schedule which he himself has prepared.

Mr. Levit: I will reframe the question. And I might say to your Honor——

The Court: I don't think—I will overrule the objection.

(Testimony of Frank Momyer.)

Mr. Levit: I might say that I want to pursue this, as long as counsel says these figures are incorrect.

The Court: What is that last item again, the——

Mr. Levit: The item of fixed charges and continuing costs, that would have been earned normally in the year following the fire, was the amount, according to the claim, of \$646,190.47, was it not?

The Witness: That is correct. That is found on the summary of the claim—six forty-six one ninety forty-seven, being for the year period July 8, '45 to July 7, '46.

Q. (By Mr. Levit): All right. Now it is also true, isn't it, that the total of those two figures was \$1,004,649.03, as shown by the proof of loss?

A. That's right.

Q. And that is the figure that was allowed—or claimed, I should say—as the so-called insurable values?

A. That's correct.

Q. Now, then, it was necessary, was it not, in order to calculate the amount of the actual loss of net profits and continuing charges, to reduce the twelve months' base to a nine months' base, is that not correct?

A. Correct.

Q. And in order to do that in the claim, Pickering calculated the amount of the profits, fixed charges and expenses that were [46] applicable to the period of the last three months of this annual period, is that not right?

A. That is correct.

Q. In other words, it was done by a process of

(Testimony of Frank Momyer.)

subtraction; you first calculated it for a year, and then you took out the last three months, and by that you got the period of the nine months before the fire, right? A. That is correct.

Q. And the figure that the proof of loss uses for the three months, which was deducted, is \$199,479.50, is that not so?

A. That's correct, but the breakdown of that item that you have used here is entirely incorrect.

Q. All right. We will mark, then, the items on this that you cannot identify.

A. I can identify those (indicating).

Q. Pardon me just a minute.

A. The caption is not correct.

Q. All right. Now you don't identify this figure. I am going to check them. Will you watch me please? I am going to put a little check mark after the figures you don't identify.

A. You are talking about the dollars there.

Q. You said you couldn't identify these three, didn't you?

A. I said I couldn't identify the \$111,000 you asked me about, or the \$246,000.

Q. That's right. And of course that would be true of the detail [47] precedes it, wouldn't it?

A. It would be true of this unit of cost you talked about, which I don't know what it means. I don't know what the unit of cost means here (indicating).

(Testimony of Frank Momyer.)

Q. All right. You don't identify this figure of six sixty-eight, do you? A. Yes, I do.

Q. You do?

A. I identify this total, because it appears in the proof of loss. It is the breakdown you make there (indicating).

Q. If I understand you correctly, then, going back to the profits prevented on the annual base, before it says "total" on the fourth or fifth line from the top of Exhibit X for identification, you can identify all three of those figures shown in the proof of loss column?

A. Fifty-three million six hundred seven nine thirty-four, correct. Fifty-three million six hundred seven nine thirty-four feet.

Q. I see. Correct.

A. Six sixty-eight, six sixty-seven. That is carried out five places. \$6.67 plus.

Q. That is the unit cost, isn't it?

A. No, that is the profit per thousand.

Q. All right, the profit per thousand.

Mr. Whittaker: May the record show—I don't know that [48] it does—that what is being done is that counsel for plaintiffs is standing before this witness with this Exhibit X in his hand and is interrogating the witness therefrom?

The Court: That's right. And when the record shows that reference is made to "this," "that," and the other, they are referring to Exhibit X for identification.

(Testimony of Frank Momyer.)

Mr. Levit: That is correct.

Mr. Whittaker: Yes, your Honor.

Mr. Levit: And you also identify, of course, as you have already testified, the amount column total of \$358,456.56? A. That is correct.

Q. All right. Now you have already identified the next item, of \$646,000-plus, haven't you?

A. Six forty-six one ninety forty-seven appears in the proof of loss in the summary.

Q. And you have identified in the claim or proof of loss the next total item of a million and four thousand dollars plus; correct?

A. One million four thousand six forty-nine 0 three.

Q. Now do you also identify the total of the three months' allocation of charges and expenses and profits to be deducted in order to arrive at the loss of these two items for the loss period of nine months; namely, \$199,479.50?

A. I can arrive at that total, but not the two items that you use in making up that total. [49]

Q. In other words you cannot identify the two items which I am now checking? (Indicating.)

A. I can identify them, but you call them "logging, use, profits, fixed charges and expenses applicable to the period of 4/7/46 to 7/7/46," three months' period, and then you show "logging" and "lumber," with a bracket, indicating that ninety-two two sixteen ninety-six of that amount applies to

(Testimony of Frank Momyer.)

that. Well, I call your attention to the fact that ninety-two two sixteen ninety-six——

Mr. Levit: Let the record show that the witness is reading from page 2 of Exhibit 2 attached to the proof of loss, schedule I.

Q. In other words, you do have in your proof of loss the very figure that we have in the proof of loss column in that category we have just referred to, of \$92,216.96, correct?

A. You call that “logging” and “lumber,” and it is not that at all. It is——

Q. Well, now——

Mr. Whittaker: Let him answer, if the Court please.

Mr. Levit: I am sorry, I didn’t mean to interrupt.

The Court: You call it “logging” and “lumber,” and you were going to say it isn’t that at all?

Q. (By Mr. Levit): What is it?

A. It is the part of the annual profits that apply to that three months’ period. The annual profits from the whole operation. [50] That part of the three fifty-eight four fifty-eight fifty-six that goes in the three months’ period. It has nothing to do with any particular department at all.

Q. Well, you don’t mean to say that you didn’t deduct in calculating the loss for nine months, that you didn’t deduct the proper proportion of the fixed charges in continuing costs, do you?

A. I will tell you about that. Where you say

(Testimony of Frank Momyer.)

“box factory” down here, one hundred seven thousand two sixty-two fifty four, that is continuing charges, and the expenses for the three months’ period. Where you got “box factory” for that, I don’t know.

Q. I see.

The Court: In other words, what he is telling you, Mr. Levit, is that that amount of \$199,000 is divided into two amounts, \$92,000 for the three months’ period as far as the profits are concerned, and one hundred odd thousand dollars for the three months’ period as far as expenses and so forth are concerned.

Mr. Levit: Fixed charges, we will call them.

The Witness: That is exactly right.

Q. (By Mr. Levit): That is “C” and “CE,” and continuing—fixed charges and continuing expenses here (indicating)? A. Yes, sir.

Q. Now, then, you will note— [51]

The Court: Your Exhibit X is wrong in your description of those amounts, not in the amounts themselves.

Mr. Levit: That’s right.

Q. Now, then, if you will notice the words I have written in in pencil opposite these two figures that go to make up a total of \$199,000, then this exhibit, if we take that, correctly portrays your claim on that point, does it not?

A. If you will strike “logging,” “lumber,” and “box factory.”

(Testimony of Frank Momyer.)

Q. Yes. I won't strike it, because it still applies to the other two columns. But so far as your claim column is concerned, that is to be changed, is that right?

A. That's right. It has nothing to do with logging, box factory, or lumber, strictly.

Q. All right. Then you arrive finally by deducting the three months from the year base, at a figure of fixed charges, and continuing costs plus profits prevented for the so-called loss period that would normally have been earned in the nine months after the fire, of \$805,169.53, is that not correct?

A. Eight 0 five one six nine five three appears on the summary of the claim in the proof of loss.

Q. Then you calculated the salvage values, did you not? A. Correct.

Q. And in the category of logging, you calculated a salvage gross of \$60,125.19?

A. Sixty thousand one twenty-five nineteen appears across on [52] page 20 of the proof of loss, schedule Roman numeral three, and this item is supported by schedule R-I appearing on page twenty-one of the proof of loss.

Q. I mean the figure is correct, isn't it?

A. The figure is correct.

Q. And then as to box factory, you calculated the salvage at \$44,375.16, did you not?

Mr. Whittaker: If the Court please, are you using—counsel is using the term “salvage.” We do not concede that that is an appropriate term. I

(Testimony of Frank Momyer.)

don't want to be fussing about words, but what it is, is in relation to the box factory profit—isn't that what you mean, Mr. Levit?

Mr. Levit: On the last item, yes. Oh, I don't place any particular reliance on the use of the term.

Q. But the figure is correct, is it not, that amount of profit calculated for the box factory in the claim was \$44,375.16?

A. That's correct, that appears on page 20 of schedule Roman numeral three and is made up of three items: Fifty-nine thousand two forty-nine ninety-three plus three thousand three eight-five forty-three, totaling——

Q. Pardon me, Mr. Momyer. I am merely trying to identify the totals, because all we are interested in here is the total. This is not in any sense a detail, it is merely a summary of the totals.

Mr. Whittaker: But what you are doing, Mr. Levit, is to [53] characterize by your question the \$44,375.16 as the box factory profit with which we credited the claim. Now actually that is the box factory profit less the inventory replacement, of \$18,000. Am I not right, Mr. Witness?

The Witness: Correct.

Mr. Levit: When you say "inventory replacement," are you talking about the two million feet of the eight million that went through the box factory that was allowed all the way through by the companies and by the appraisers?

Mr. Whittaker: Yes, Mr. Levit, except I don't

(Testimony of Frank Momyer.)

know whether it was two million feet. I could get it for you.

Mr. Levit: Well, it was approximately two million feet.

The Court: It was approximately that, yes.

Mr. Whittaker: All right. You see, the box factory profit with which the proof of loss credits the claim is \$59,250.93. That is the \$6.71 per thousand profit, times the 8,828,644 feet of lumber put through the box factory after the fire. So I don't want any misimpression to be left here that we credit the claim with profits from box factory of only \$44,000.

Mr. Levit: That is all you did credit it with, counsel.

Mr. Whittaker: When we credit the claim with the full \$59,000 and then deduct the inventory replacement from it.

Mr. Levit: Well, it is just six of one and a half a dozen of the other. The point is that in the makeup of the [54] claim, the companies were given credit against the claimed loss, so far as the box factory operation was concerned, of \$44,375.16, the net credit.

Mr. Whittaker: The net credit, yes.

Mr. Levit: Certainly.

The Court: Well, that is the ultimate fact?

Mr. Levit: That is right.

The Court: Is that the fact?

The Witness: That is correct.

The Court: The ultimate fact?

(Testimony of Frank Momyer.)

The Witness: That is correct.

Q. (By Mr. Levit): Now as far as that two million feet is concerned, as long as Mr. Whittaker has mentioned it, the fact is, isn't it, Mr. Momyer, that the Pickering Lumber Company was claiming originally, was talking about, a claim of five million feet?

A. No, sir, we never did claim as much as five million feet that I know anything about. We claimed, I believe at one time, three million feet.

Q. Mr. Momyer, you remember testifying before the appraisers, don't you? A. I do.

Q. I am going to call your attention—well, I will ask you this: You recall that Mr. Herrick, the appraiser appointed by Pickering, took notes at that hearing, don't you? [55]

A. I believe he did.

Mr. Levit: There is in evidence here, if the Court please, Exhibit T, which is a transcript of Mr. Herrick's notes taken at the hearing, which he testified were dictated by him shortly thereafter from his penciled notes, and that is reproduced in the transcript, and I think it is also—it may also be here by separate copy; I am not sure.

Q. I am going to read to you from Mr. Herrick's transcript, Mr. Momyer, and see if that refreshes your recollection as to what Pickering claimed with respect to how much credit they wanted to take off that profit before crediting the insurance claim with it. Page 126 of the transcript, line 20. It relates to

(Testimony of Frank Momyer.)

your testimony, Mr. Momyer, and refers to schedule R for the claim:

“Stated that the company——” and this is what you are supposed to have said, and I am going to ask you if this refreshes your recollection:

“Stated that company had used all of its lumber inventory remaining after the fire, with the consequence that the box factory could not start coincident with the sawmill. But that it was necessary to wait until the sawmill had produced sufficient lumber. Said that the mill produced about five million feet between August 1st and September 9th, when the box factory started, which was the minimum amount necessary to justify [56] starting the box factory.”

Do you recall that you did assert that five million feet was the minimum amount that you needed to start the box factory?

A. Well, if it is there, I must have said it, and I stated yesterday before the proof of loss was filed and before the mill started, we talked about inventory replacement, but no one knew how to calculate any dollar value for the inventory replacement. But our proof of loss on page 22, which was before the appraisers at that time, schedule R-4, Roman numeral three, makes a calculation of two million seven hundred twenty-seven thousand feet at six seventy-one per thousand, to arrive at eighteen thousand two fifty-one twenty, and we stood on that at that time, because we had a basis from which to make that cal-

(Testimony of Frank Momyer.)

ulation. We knew how long it was after the saw-mill started before the box factory started operating, and we had a definite basis to make the calculation. Now it may be that somewhere along the line during the preliminary discussions that we didn't know whether it would take five million or three million or two million, and maybe that figure was mentioned. That has been a long time ago. But it remains that we finally claimed two million seven twenty thousand feet and we would have been satisfied with that.

Q. And you got that, didn't you?

A. No, they didn't calculate it on two million seven twenty. I believe they used two million feet. But they got a different [57] dollar value, because they were talking about a different rate of profit. They have been using a different rate of profit.

Q. Well, actually, they used an entirely different method of calculating the profits to the box factory than you did, didn't they? A. Yes, they did.

Q. So of course they would get a different result. Now then, you deducted as salvage, or as a credit, let's say, against the claim of \$805,000-plus, the amount of \$104,500.35, which came out to a figure of \$700,669.18; that's correct, isn't it?

A. Yes, that figure is arrived at by subtraction from the other.

Q. Now, then, you also added in the so-called excessive logging costs as to which you testified yesterday, didn't you? A. Correct.

(Testimony of Frank Momyer.)

Q. And did you deduct from that the item of grazing renting, which was a very minor item but which was a contra item——

A. That was put in by mistake and taken out in that manner.

Q. Yes. That was then a total of \$41,335.23 that you added to your claim, to get the final net loss claimed of \$42,004.41, is that not correct?

A. Seven hundred forty-two oh oh four forty-one was the amount in our proof of loss.

Q. Now it is true also, is it not, that although it does not appear in your proof of claim, that you subsequently urged before the appraisers the additional claim for log stain, log [58] decking, and so on?

A. No, sir, that is entirely incorrect. It was already——

Q. Correct me, then, please.

A. It was already in the claim.

Q. It was in your proof of loss?

A. Yes, sir, I can give you the page.

Q. Show me.

A. You have arrived at a total of seven hundred ninety-seven thousand oh eighty-two thirty-five as being the total claimed by Pickering.

Q. That's right.

A. So far as I know, we never claimed an amount of that kind. The seven forty-two oh oh four forty-one is the amount claimed, and includes

(Testimony of Frank Momyer.)

the items that you have erroneously added on there a second time.

Q. Look. As far as the addition and subtraction go, if they have been correct up to this point, the \$42,004.41 does not include the claim for log stain or log decking, does it?

A. But some of your subsidiary figures do, Mr. Levit. For instance, the fixed charges and continuing expense include the log stain of thirty-six one forty-nine ninety-five as depreciation. Likewise the log decking——

Q. Now let's be specific. Which figure now?

A. This one hundred seven thousand two sixty-two fifty-four.

Q. Or the total, in other words, of 199,479.50 includes that [59] figure of \$55,000. That is your statement, isn't it, for log stain?

A. I was talking about the thirty-six thousand and the twelve thousand four ninety-two thirty-five.

Mr. Whittaker: That is the decking.

Q. (By Mr. Levit): Yes, the log stain and log decking figures. A. That's correct.

Q. And they are shown in the proof of loss?

A. They were shown in the proof of loss on page 17 and carried to page 6, and then carried forward to the summary.

Mr. Levit: If that is so, your Honor, then there has been a miscalculation in the claim column, and I will have to check that.

The Court: Well, you have duplicated it, that is all. You have added it on.

(Testimony of Frank Momyer.)

Mr. Levit: I have added it on twice.

The Witness: It has been on twice, and it is already in there, and you will find it in there from the references, I believe.

Q. (By Mr. Levit): Now you recall the testimony that you gave on direct examination with respect to the item of stain and various other elements of depreciation, so-called, to the logs; you recall that, don't you? A. Yes, I do.

Q. Referring to that, you treated that in your claim, did you not, [60] as an abnormal loss due to the conditions that existed after the fire?

A. That's right. Depreciation, in other words. It was a part of our depreciation claimed, part of it was, and the rest of it was cost of partial operation.

Q. Well, you speak of it as depreciation. Of course, depreciation is one of the items of continuing charges and fixed charges and continuing expenses that is basically insured by the policy, is it not? A. That is correct.

Q. And in calculating your claim, so far as those fixed charges and continuing expenses was concerned, you did not actually include any depreciation on these logs at all, did you?

A. We did not include any?

Q. No, I mean in calculating the figure of depreciation or the figure of fixed charges on the annual basis, you did not include any of this item of so-called log depreciation?

(Testimony of Frank Momyer.)

A. I can't say that I knew what depreciation was going to continue following any fire, because I don't know what was going to burn, and I wouldn't know what to put in, but I put in an amount for depreciation of whatever nature that might be the subject of a claim following the fire.

The Court: I don't follow that question. Read it.

Mr. Levit: Well, your Honor, I think it may clarify it for the witness—I may be confusing him, and I don't want [61] to do that. Let me make a brief statement, to this extent. They start out by calculating the profits that would have been normally earned and prevented in the year following the fire. Then they calculate the fixed charges and expenses, continuing expenses, that would normally have been earned, that would have been necessarily incurred and normally earned in the year following the fire. The total of those two items gives their insurable values. Then they bring that down to a nine months' basis by deducting the three months. Now my point is that in making that calculation, they did not include—and properly so; I am not contending it was in error—any amount whatever for this so-called log depreciation; that they took this log depreciation later as an abnormal loss applicable, and added it into the nine months' figures, but they did not include it in the base from which the original nine months' figures were calculated.

Q. (By Mr. Levit): Is that not correct, Mr. Momyer?

A. I believe that is correct.

(Testimony of Frank Momyer.)

Q. All right. Now stain is of no particular significance, is it, in connection with box lumber?

A. Box lumber?

Q. Yes.

A. You wouldn't be likely to channel any stain lumber to a box factory, because it doesn't usually occur in the lower grade of lumber. It occurs in your best lumber, your clear lumber [62] that may be next to the bark of the log, the outer part of the log, where there is your best lumber. And I wouldn't say that that kind of lumber would normally be sent through the box factory.

Q. Now, in other words, this problem of stain is a problem that applies mostly to the so-called "uppers" or the higher grades, isn't it?

A. I think that is generally true, because you get your higher grades usually from the outside of the log.

Q. And as a matter of fact, I think you have testified that under the conditions that existed at that time, it was much more profitable to Pickering to run lumber through the box factory than it was to manufacture it through the sawmill and then divert it for sale purposes, isn't that correct?

A. Up to a certain point. There was some grades of lumber that wouldn't be profitable to put through the box factory.

Q. Isn't it a fact that the only lumber you sold during this period at all was where you had certain commitments to sell it, or for some other reason, of

(Testimony of Frank Momyer.)

perhaps allocation by the government, you weren't permitted to run it through the box factory?

A. No, sir, that is not true, and the records will speak for themselves on that. As a matter of fact, we sold almost forty million feet in the tested year, thirty-seven, according to the statement that you had there awhile ago; whereas we only put through the box factory about sixteen million feet. [63]

Q. You don't recall your attorneys making the statement that it was the box factory operation that was profitable and that the only reason that lumber was sold during this period directly without going through the box factory was to fulfill commitments that had already been made?

Mr. Whittaker: I believe that was after the fire. That was after the fire, counsel. That was not before the fire.

Q. (By Mr. Levit): That was after the fire, certainly.

A. When we had inventory. We put as much lumber through the box factory for the benefit of the insurance companies as we could; we leaned over backward and put some higher grades there that normally might not have been put through the box factory, because we did want to keep the box factory going.

Q. Yes. I am talking about the period after the fire; I thought I made that clear, but I guess I didn't. Now these fir logs are more expensive to handle from a logging point of view; are they not,

(Testimony of Frank Momyer.)

because they being smaller than your other logs, why, it takes more of an operation to handle them, to get the same number of feet out of them, doesn't it?

A. They are smaller logs, generally, yes. But as pointed out yesterday, it is not possible in following a log through the operation there to develop any difference in the cost through the mill. In other words, when you bring it from the tree down on the railroad and put it through the sawmill, it is all in one package, and I have never been able to distinguish there [64] any difference in the cost. You might hit on some theories there that if there was any difference it might be more for fir, because, for instance, in loading the logs, we pick up one log at a time to load it on the railroad cars, and being a smaller log, you wouldn't load as much footage as you would in a larger log, and fir being normally a smaller log, you might say there was some difference, but maybe somewhere else there is an offset, so I still say that as far as going through the sawmill, clear through to the point where it is sold as lumber or further processed through the box factory, I have never been able to find any reason to say that there was a difference in the cost at that diversion point.

Q. I want to direct your attention, however, to the logging part of the process alone, eliminating any consideration of the sawmill and the handling through the sawmill. Is it not a fact that because

(Testimony of Frank Momyer.)

of the smaller size of the fir logs, the cost of logging fir footage produced for the sawmill, not through it but for it, is greater?

A. I can't make a statement that would definitely support that.

Q. But at any rate, you did not take into consideration in calculating your claim that it was greater, did you?

A. No, sir. We took it all at the same.

Mr. Whittaker: If the Court please, on this line of questioning I believe we have unnecessarily taken up the time. The question is with respect to this matter, not whether the [65] appraisers found a correct amount. The question is, did they discharge the submission on the one hand, or on the other hand, did they exceed the submission with respect to extra charges. The testimony before your Honor will show that as to the item of extra charge costs for logging, and as to the costs for decking and as to the \$36,000 for log depreciation, they made no computation or finding of amounts. One of the appraisers, Mr. Maloney, denied all the liability for all of those claims. Mr. Herrick took another view, and he says there were days of debate about the matter, and finally the matter was compromised by, as Mr. Maloney says, "We allowed \$25,000 for the sheet," meaning the sheet in the schedule that contained all those items, "without any computations."

Mr. Levit: You weren't quoting Mr. Maloney, were you?

(Testimony of Frank Momyer.)

Mr. Whittaker: Yes, I am quoting him here from the deposition. "We allowed \$25,000 for the sheet." Now I have to go one step further. With respect to depreciation on the logs, Mr. Herrick says, "This was not depreciation, but was deterioration—therefore not allowable by the policies."

Mr. Levit: He didn't say, "by the policies," counsel. I am sorry.

Mr. Whittaker: Well, I will take out "by the policies." Therefore not allowable.

Mr. Levit: He wasn't talking about the policies at all.

Mr. Whittaker: Well, if it is allowable, it is allowable [66] on the policies. So we say that what they did was to entertain jurisdiction on a question of law and misresolved it. Therefore, they exceeded the jurisdiction of the appraisers under the submission in that respect.

Then on the other side of the matter, they failed to discharge the submission by making findings of fact as to the amount of loss with respect to the extra large logging costs of \$42,000, the extra decking expenses of \$20,000-odd, and logging depreciation of \$36,000; which they just compromised without any computation at \$25,000.

Now Mr. Levit is seeking here by this line of questioning, it seems to me—and I have had this in mind for a long time now—to try the whole case, and not the issues that are constituted by the pleadings.

(Testimony of Frank Momyer.)

The Court: Well, it is my understanding that Mr. Levit is attempting to show that these various items were in dispute and that resolving them one way or another depended upon taking into account certain accounting principles and certain other facts, such as the handling—whether fir is heavier or lighter than pine and harder and costs more to handle and all that—and he is doing that with a view to showing that this decision was really a decision of fact, of an ultimate fact, to wit, what the profits were and what the expenses were. And that therefore it was within the province of the appraisers whether they were arbitrators or appraisers, to determine that that is a [67] fact, and they did so.

Now you claim as a matter of fact that they based their decisions not only on erroneous theories of accountancy, but also on erroneous theories of law, and that they didn't find the fact but determined questions of law.

Mr. Whittaker: Yes.

The Court: And that as appraisers, they were not entitled to do so and therefore the award should be set aside. But he is developing his theory of the case by these questions, and I think that he ought to be allowed to continue.

Mr. Whittaker: I certainly defer without further argument to the Court's ruling, but I want to make this observation in that regard, if I may, your Honor:

(Testimony of Frank Momyer.)

Mr. Levit is attempting to, as your Honor has put it, show that the appraisers over all determined a result as a matter of fact. Whereas my point is that to meet any such effort would require a trial by us of the whole case, whereas the issue here is now here. It is the four points made by the pleadings, as to whether or not the appraisers in doing what they did in those particular circumstances exceeded the submission or failed to discharge it.

The Court: I get your point.

Mr. Levit: Now may I say this, your Honor, with regard to what counsel has just said. It sounds very much as though counsel has not read his own pleadings, because while that is [68] one of the points he makes, basically he must stand on the fact that as to these four points, the appraisers made a mistake. I mean, he has got to stand on the idea that the award was inadequate as to these four items. If that isn't established, he hasn't proved any case at all. I don't care what the appraisers did, what door they went in or what road they traveled, if as a matter of fact on these four items which he claimed they erroneously decided, they came out with the right answer, or an answer within the right area. The Court is certainly not going to set this appraisal aside.

Mr. Whittaker: Now that would be right as respects those four points. But not on the overall case.

Mr. Levit: Correct. This has nothing to do with the overall case. This is one of your four points.

(Testimony of Frank Momyer.)

Mr. Whittaker: Well, then, I believe counsel are in agreement.

Mr. Levit: Certainly.

Mr. Whittaker: But I believe counsel in his interrogation of the witness has exceeded those issues made by the pleadings. Your Honor will readily appreciate that at our pre-trial hearing we definitely agreed that what we are going to try were issues of the first count.

The Court: That's right. You see, these questions that he is asking him now, under his theory, deal with the question of cost of lumber into that box factory, as I get it. [69]

Mr. Levit: Well, this particular point of log stain deals with the so-called claim for depreciation on the logs.

The Court: That is one of them.

Mr. Levit: It is one of the so-called compromise items.

Mr. Whittaker: Now he was asking him about the extra logging costs, and therefore attempting to show that it costs more money to log fir, which we had to do after the fire, and my point in that connection is, your Honor, that it isn't a matter that we should be here concerned about, because the appraisers didn't find any amount, and the error is that they failed to find any fact as to the amount of the extra logging costs, but compromised it.

Mr. Levit: Now, your Honor, it sounds like counsel wants the Court to decide this case purely

(Testimony of Frank Momyer.)

as a matter of law; that is what we tried to get the Court to do in the first place, unsuccessfully.

Mr. Whittaker: No, I am trying to keep my issues alive.

The Court: Well, we can continue this argument this afternoon. We will adjourn now and be back at a quarter of two, because I will leave this afternoon at three twenty-five today. That is why we met early this morning, so that I would give you the full time.

(Whereupon a recess was taken until two o'clock p.m. this date.) [70]

Afternoon Session, Thursday, June 9, 1949
at 1:45 o'Clock.

FRANK MOMYER

recalled as a witness, previously sworn.

Cross-Examination

(Resumed)

By Mr. Levit:

Your Honor, I understand that assuming we do not finish this afternoon we will continue tomorrow morning?

The Court: Oh, yes.

Mr. Levit: I am not sure whether we were in the middle of an argument or not.

The Court: You were in the middle of an argument whether or not you should question the witness

(Testimony of Frank Momyer.)

about the cost of logging fir compared to the cost of logging pine.

Mr. Levit: My impression is, but I am not sure, but my impression is that the question had been substantially answered.

The Court: Yes, he said he did not say it made any difference so far as the claim was concerned. That was your answer, wasn't it?

A. I believe it was.

Q. (By Mr. Levit): As I understood you, Mr. Momyer, you agree, do you not, that so far as the cost of logging was concerned, the bigger the log the more footage you would get out of it for more or less the same expense? Is that true, generally speaking?

A. I wouldn't say that. I think what I have said before is that [71] one particular operation might be more expensive on one log than on another. In other words, sugar pine is heavier than fir. It is more dense and heavier than fir. Therefore, if you go into transportation costs, and we usually go into transportation costs by weights, so that it would cost a little more to haul it on the railroad than fir. My statement is, by analyzing the thing all the way I still can't find any reason to differentiate any cost of logclear through the mill to the point of diversion to the box factory or to the planing mill and shipping dock for sale as lumber.

Q. Then, the fact is, in preparing your claim, you did not take into consideration any differenti-

(Testimony of Frank Momyer.)

ation in cost due to the fact that you had, as you testified, moved over to the fir in the logging after the fire?

A. We did not because you will recall a part of that logging operation was bringing in logs that were already on the ground. In other words, slightly more than half of the operation was bringing in footage that was already on the ground and that would have been pine or whatever happened to be on the ground. Therefore, it was unnecessary to make any differentiation as far as I am concerned.

Q. It is a fact, is it not, that so far as rot is concerned, it occurs in fir frequently before the fir is cut at all, doesn't it?

A. If it does, it normally isn't cut. You select the trees you [72] want to cut before you actually cut, you have a man called a bullback who goes around and marks trees to be cut and he tries not to get defective trees.

Q. He tries not to, but it is a fact that rot is known to occur in fir that is cut for use in mill operations before the trees are cut?

A. And also any other species.

Q. But it is particularly true of fir, is it not?

A. I wouldn't say that there is any more rot in fir than there is in the pine. There are a lot of pines that have rot in them.

Q. These estimates that were made by Mr. Moffatt and by Mr. Thomas were an attempt on their

(Testimony of Frank Momyer.)

part, I believe, to estimate not only the extent of so-called deterioration or depreciation in these logs, by your check tally, but also to actually allocate by months or by a period of time the time when this particular depreciation or deterioration occurred, is that not so? A. That is correct.

Q. So that it was obviously and of necessity an estimate, wasn't it?

A. It would have to be an estimate, certainly.

Q. Considering the state of the market at the time that we are talking about in 1945, isn't it true that at that time the demand for lumber was such that there was very little degrading on account of stain or conditions of that kind? [73]

A. I would say there was a good demand for lumber, but as far as degrading, Mr. Levit, that wouldn't take care of it. If you sort those logs you could see the rot——

Q. Let us forget the rot for the moment and talk about the stain. That was generally true considering the state of the market at that time that there was very little degrading on account of stain?

A. You will recall, I believe, from reading Mr. Moffatt's report, that practically all of the lumber that was stained was finally rotted, because he made his test to show what it would have been if the lumber had been stained only, and no consideration given to the rot; but as a matter of fact, the stained lumber was almost all rotted.

Q. You are not attempting to say this claim

(Testimony of Frank Momyer.)

was all rot and there was not any substantial part of it that was stained?

A. I am only quoting from what Mr. Moffatt said he did there. He made the test that there was some lumber that was stained and was not rotten entirely, but most of it was rotten and the way you got a differential on the stained lumber, that in order to trim it to get the best boards out of it, quite often it dropped a grade lower and you got less price for it, and if it had been normal and you had a higher grade out of it.

Q. Of course, what happened where degrading was necessary, that instead of getting a higher percentage of uppers or the top grade out of a log, you got a greater percentage of the lower [74] grade, didn't you? A. Correct.

Q. That, however, was no particular disadvantage, was it? Because the truth of the matter was that Pickering made more money by putting the lumber through the box factory than by selling it as high grade lumber.

A. It did, but this particular lumber was not put through the box factory because it was not sawn until the sawmill was in operation, which was outside the insured period and most of it was sold.

Q. Of course, it is true, isn't it, that the insurance companies in the makeup of your claim were in no way concerned with what happened to that lumber. You were claiming a depreciation within the insured period, were you not?

(Testimony of Frank Momyer.)

A. Yes.

Q. What I am asking you is, to the extent there was a degrading as a result of that depreciation, it wouldn't have necessarily cost any money to Pickering because of the fact that you could still use it for box lumber in the lower grades, anyway, and you made more profit than by selling it as uppers, wouldn't you?

A. It depended on how high up you go, Mr. Levit. Taking all grades sold as lumber there was a greater realization per thousand on the lumber that went to the box factory.

Q. By the way, are you familiar, and I suppose you have read and [75] are familiar with the brief that was filed with the appraisers by the Pickering Lumber Company?

A. I have read that. It has been quite a long time ago. I haven't read it recently.

Q. This brief, I assume, was prepared by the attorneys, was it? A. I believe it was.

Q. So far as the factual statements in it go, however, it is a fact that you were consulted with relation to the makeup of this brief?

A. I think in some cases where there were figures needed that I was consulted, but not on all the statements made in there.

Q. I will ask you if you were consulted on the statement which is on page 43 about two-thirds of the way down:

“Pickering made a bigger profit on the lumber

(Testimony of Frank Momyer.)

that went through the box factory than it did on the lumber that was sold directly from the sawmill or planing mill."

A. As a whole, yes, but on certain of the higher grades of lumber we made more and we didn't put that through the box factory under any circumstances.

Q. If that was not generally true and not specifically true, will you explain, please, the statement that is made in the answer which Pickering filed here on pages 17 and 18 to the effect that:

"During the entire nine-months period following the fire, lumber to be used for the manufacture of box shook [76] was of greater value to defendant than lumber to be sold after it had passed through the saw mill and the planing mill, because under O.P.A. ceiling prices a greater profit could be made upon the lumber manufactured into box shook. In the transaction of its regular business, defendant did not sell any of its lumber suitable for the manufacture of box shook and never at any time contracted with any of the plaintiffs to do so, and so forth."

That is a correct statement, is it not?

A. "Suitable for the manufacture of box shook," you notice it says; that doesn't mean all the upper grades of lumber.

Q. But if the upper grades of lumber as a result of that degrading process caused by the stain that you have spoken about, if the upper grades

(Testimony of Frank Momyer.)

of lumber had to be degraded, then it would be lumber suitable for box shoo.

A. It depended on how far down it went. If it just dropped one grade, then it would still be salable as lumber on the market.

Q. It is a fact, is it not, Mr. Momyer, that the figure which you carry into your proof of loss as to which you have testified that relates to the so-called excess logging costs that were incurred after the fire is an estimated figure, isn't it?

A. I wonder what you mean by "estimated"?

Q. I mean to say it merely represents the best judgment of the Pickering Lumber Company as to what it was proper to set up this so-called excessive logging cost at that it represents an [77] opinion, in other words, and not a fact.

A. It is a comparison of the cost of logs brought in prior to the fire and a comparison of the cost of bringing in logs after the fire, the difference between the two being the excess cost that we have planned.

Q. What is that difference per thousand?

A. \$3.60.

Q. I ask you again, Mr. Momyer, if it is the fact that that figure of \$3.60 is merely an opinion and does not represent any fact at all.

A. No, I cannot say, because as previously stated, we had the high cost of logging at a time when we normally have a lower than average cost of logging at that time of the season. At the start of

(Testimony of Frank Momyer.)

the season when you are getting ready, getting the roads and everything ready, costs are normally higher, and therefore July to August 7 was a high cost period and it can be supported as a high cost period from previous records, and the period of July and August and possibly September when maximum volume is reached, is a low period of operation because you are bringing in greater volume. We arrived at this conclusion that if the cost following the fire were higher when normally they should have been lower, then certainly we could have been justified in claiming the difference between that higher cost and the cost prior to the fire, admitting that that was even a higher cost than would probably be there, but it [78] certainly was a reasonable basis, and that is the basis on which we computed this.

Q. Mr. Momyer, granting that it was a fact beyond dispute that the Pickering Lumber Company had to spend more to log per thousand feet or per foot, after the fire than before than its normal cost, what I am asking you is something different; I am asking you if it is not a fact that the figure which you used of \$3.60 per thousand feet to represent that cost was purely your own estimate and your own judgment?

A. It was certainly our own judgment on the basis of the facts that we knew about.

Q. You will not concede, then, that any factor of opinion or estimate or judgment enters into

(Testimony of Frank Momyer.)

that \$3.60 figure, but it is merely a matter of mathematical calculation; is that what you intend to tell the Court?

A. I have told the Court how we calculated it, and whether that is an estimate or rate is something else I cannot say. I have shown you how we calculated it and the basis we used and I don't know what further answer I can make.

The Court: What counsel wants to find out from you is, was there in that calculation any factor that had to be, or any element that had to be just an estimate or a matter of judgment rather than a matter of arithmetic computation?

A. In both costs, your Honor, there is this depreciation I mentioned this morning that has always to be an estimate because [79] you can't determine that. Factually there are differences of opinion as to how much depreciation occurs.

The Court: But he is speaking of the excess logging cost.

A. The excess logging cost both factors were used, the \$21.91 and \$25.51, and there is an item for depreciation and that, of course, is an estimate. I don't think of any others at the moment but there are probably other items in there that are handled in the same manner as depreciation.

Q. (By Mr. Levit): I am going to ask you whether or not you agree with the statement made by Mr. Herrick in Plaintiff's Exhibit B to this effect, and I quote:

(Testimony of Frank Momyer.)

“The excessive logging cost which had been claimed of \$42,797 was palpably excessive. It was undeniable that the logging cost during the loss period would naturally be greater than during the preceding year due to the continued increase in any of labor and cost of material of the amount of increase applicable to the reduced production which would be reasonable of allowance but only be determined by guess. There had been no adequate evidence with respect to this,” and so on.

Do you agree with that statement, or do you disagree with it?

A. I disagree to the extent that we presented the best evidence that we knew how.

Q. Mr. Momyer, isn't it a fact that you yourself admitted to the [80] appraisers at the formal hearings that were held by them that the question of whether this \$3.60 rate was excessive, was an open question?

A. I haven't denied that here. I said that was the best estimate we knew about. Mr. Herrick questioned it and I have said he has a right to his opinion, but we presented the best evidence we knew how to present and that is all I can say on it.

Q. Then, it was true as is stated in Mr. Herrick's notes of the hearing, which is Plaintiff's Exhibit T, and I am reading from page 132 of the transcript of Mr. Herrick's deposition:

“Upon question by Herrick as to why the rate of \$21.91 and \$25.51 had been used to develop the

(Testimony of Frank Momyer.)

excess average cost after June 30 of \$3.60 while the average for the entire operation of \$23.45 (page 24) had been used in Schedule R-6, he conceded that the question of whether the \$3.60 rate was excessive was an open one."

Is that a correct statement?

A. I haven't meant to deny that. Mr. Herrick is entitled to his opinion and I am entitled to mine, I suppose, and I still say that we presented the best evidence that we knew how taken from something that was concrete, at least; it was not a guess.

Q. Bearing in mind, then, your testimony before the appraisers and trying to continue to paragraph 14 of the second amended answer filed by the Pickering Lumber Company in this action and I am going to read that paragraph: [81]

"One of the effects of the fire was to cripple and reduce the efficiency of defendant's plant. As a result thereof it is more expensive for defendant to continue partial operation after the fire. The figures taken from the defendant's books and presented to the appraisers showed that additional expense for logging amounted to more than \$42,000."

That is the figure, is it not, Mr. Momyer, that was arrived at by the use of this \$3.60 rate?

A. That plus the stain and in-check rot and so forth of \$4075.40 which is the figure developed from \$3.60.

(Testimony of Frank Momyer.)

Q. I read on from the answer:

“Said expenses”—that is the excess logging expenses—“were not estimated, but were actually incurred. The actual amount thereof was credit entered upon defendant’s books,” and so on.

Now, I ask you, Mr. Momyer, if it is not a fact that that statement in the answer to this effect of excess logging cost shown in the claim is not as stated in the answer and actual cost actually incurred and entered upon your books, but was merely your best estimate as to which you admitted to the appraisers the question of its excessiveness was an open one?

A. It may be an open one as to whether we used the right factor principle in arriving at that figure.

Q. And now, in connection with this logging after the fire, when [82] was it that Pickering Lumber Company with relationship to the fire determined it was going to continue logging?

A. Within a few days after the fire we resumed operations of bringing in the logs that were already down on the ground at the time of the fire, within less than a week—I would say three or four days.

Q. Very shortly after the fire?

A. That’s right.

Q. That is when the decision was made?

A. But the decision to cut further logs, because we had to bring in the logs that were on the ground, there was nothing else to do—the decision to log

(Testimony of Frank Momyer.)

the fir was made some time between then and the time that we actually started in the fir area, which was around the end of July, around July 27 to 30, as I remember; but we did not stop logging at any time after the three or four days that we shut down, pending what we were going to do there.

Q. I believe you testified you actually started felling additional logs after the fire, by July 27; that is, within 20 days after the fire?

A. Yes, we started felling the fir logs at that time. The others were already on the ground.

Q. Now, let me ask you whether or not it is true that in the next winter after this occurred, that the reason that the logs that the Pickering Lumber Company had on hand as a result of [83] this logging after the fire and the fact that the sawmill was not operating, and so on, that you were able to run the sawmill right through the winter when you would normally have been shut down?

A. Not for that reason.

Mr. Whittaker: Pardon me, I believe you are talking about two different years, are you not, Mr. Levit? You do not mean the winter following the fire, do you?

Mr. Levit: No, it was the year following that because the sawmill didn't start up again until after January, did it?

Mr. Whittaker: One side of it, the small side of it, finally, on August 1, 1946; but we didn't get the big side constructed until, I think, March, 1947.

(Testimony of Frank Momyer.)

Mr. Levit: I am glad you correct me, counsel. What I am getting at is this, that it is true, is it not, Mr. Momyer, that at a date after these logs were brought in you had built up, because your sawmill was shut down, a stock of logs which enabled you at some future date to run your sawmill during a period when it would normally have been shut down; is that not correct?

A. No, it is not.

Q. It is not correct? What did you do with the logs, sell them?

A. For this reason, we not only start our logging operations around April 15 to May 1 and in the year following the fire in 1946 we couldn't start our logging operation until late in July. [84] Therefore, if we could have put those logs back up in the trees we would have been much better off to have had them off, and went out April 15 and May 1 and logged until August 1 and had fresh logs to operate with—we could have logged considerably more than the 15,000,000 we had on hand at the time.

Q. Why didn't you start the logging on May 1? Was there anything to prevent you from doing that?

A. We didn't want any further loss on depreciation.

Q. But the depreciation was only a percentage of the actual value in the logs, was it not, and you charged the depreciation to the insurance companies as part of your claim?

A. Depreciation for nine months only; we had

(Testimony of Frank Momyer.)

considerable depreciation we couldn't charge to the insurance companies in the loss period.

Q. As a matter of fact you knew, didn't you, when you started to do this logging work that even if the sawmill was not put back into operation within the nine-months' period that you would still be able to use these logs that you brought in, these extra logs that you brought in during that nine months' period for which you charged the depreciation against the insurance companies when, as and if you got your sawmill into operation at some future time; you knew that, didn't you?

A. We knew we would have to use them somewhere along the line.

Q. Why, certainly.

A. But we could have used the fresh logs to much better advantage [85] if we knew what we know now; we certainly wouldn't have cut any more than were cut.

Q. Isn't it a fact, Mr. Momyer, that when this fire occurred and for a period after the fire, for some time after the fire, the Pickering Lumber Company took the position informally that the contract logging operation in its entirety was not within the contemplation of these policies?

A. Absolutely not; the insurance companies took that position and later receded from the position which we did not ever take.

Q. Your statement is that the Pickering Lumber Company did not get the value of these logs by rea-

(Testimony of Frank Momyer.)

son of having an extra supply of logs on hand so you could run your sawmill in a period when it normally would be shut down?

Mr. Whittaker: I object to that question and to the use of the word "value."

The Court: Perhaps "benefit" would be a better word.

Mr. Whittaker: "Benefit" would cover it.

The Witness: We certainly did not, for the reasons explained before.

Q. (By Mr. Levit): I understood you to say that you started this logging operation solely for the purpose of the insurance company and that you stopped it as soon as it was determined that you could not put the money into operation within the nine months' period, is that right?

A. I say that we had cut the approximately 6,000,000 feet, but [86] we had decided to get it about the same time that we received word from Filer and Stowell that they had a strike in their plant and the building of our machinery was interrupted.

The Court: That was October 8?

The Witness: That was October 8.

Q. (By Mr. Levit): Now, you did not present to the appraisers, and I mean Pickering did not present to the appraisers, did they, any figures on the allocated cost of lumber going into the box factory, that is, the allocated cost out of the sawmill?

A. We did not.

(Testimony of Frank Momyer.)

Q. Yes, the fact of the matter is that the average price that you used was the price that is the average costing of the lumber, the figure you used as average cost at which you costed the lumber into the box factory operation was a figure that was based on the Pickering operations for the year ending March 31, 1945, wasn't it?

A. You asked a pretty long question there.

Mr. Levit: I will withdraw it. It may have been confusing.

Q. You costed the lumber into the box factory operation making your calculation of the claim at a price of around \$38 or \$39?

Mr. Whittaker: \$39.86.

The Witness: \$39.87.

Mr. Levit: \$39.87?

Mr. Whittaker: \$39.86.

Q. (By Mr. Levit): And you arrived at that figure on the [87] basis of your operations for the fiscal year ending March 31, 1945, didn't you?

A. No, I did not. That was the operations from April, 1946, until the time of the fire because that lumber was considered to have been processed in that season with the exception of a small portion that might have been carried over.

The Court: You don't mean over to April, 1946?

A. I mean April, 1945, to July, 1945, I am sorry—just preceding the fire.

Q. Referring you to the auditor's report, Robinson-Nowell's report which is in evidence, and

(Testimony of Frank Momyer.)

the Clerk does not have it at the moment, this average price figure, will you find me in that report a comparable average cost figure to the one that you used for that fiscal year?

A. Are you still now talking about the lumber that went to the box factory following the fire?

Q. That's right.

A. Well, I have just stated it is not in the report for March 31, 1945, because we used the production in the following fiscal year beginning April 1, 1945, to July 7, 1945.

Q. I understand that, but what I am asking you for is a comparable figure for the preceding fiscal year. If we turn to the cost of lumber to factory for the preceding fiscal year based on your so-called average cost basis, is it not this figure that I am calling your attention to, \$37.39? [88]

A. All the figures are on the proof of loss on page 3.

Q. Will you wait until I get the proof of loss?

A. It is a little bit less than that when they finally worked it through here, they have \$36.82 in that particular year. That is Schedule P2.

Q. Yes, I have it.

A. You will find at the bottom of the page that the report to the factory in that fiscal year was costed at \$36.82 and on page 23——

Q. Pardon me. Before we leave that, calling your attention to the Robinson-Nowell report for the fiscal year ended March, 1945, and calling your

(Testimony of Frank Momyer.)

attention to Schedule 6, the next to the last line on that page states, "Cost of lumber to factory," and the price is given as \$37.39, isn't it?

A. I think so, but they have reconciled anything that might have affected that in their report. These figures have all been taken from their report. They made them and there is a slight difference there at this point in the report.

Q. Yes, but that is substantially the figure that you used? A. That's right.

Q. And actually when you got a figure to cost the lumber into the box factory on the basis of average cost, it came fairly close to that \$37.39? As a matter of fact, you said \$39.86 which is a little higher.

A. That's right, but you will find that \$39.86 figure on page 23 [89] of our proof of loss.

Q. Page 23?

A. Schedule R6, preceded by Roman Numeral III, you will find \$39.85652

Q. Yes, I see that. That is where you arrived at that figure, but it was arrived at in substantially the same way as this was in the Robinson-Nowell report. A. That's correct.

Q. There is not any Robinson-Nowell report, nor did you furnish to the appraisers any basis for calculating allocated cost.

The Court: I think he already answered that.

The Witness: I answered that already.

(Testimony of Frank Momyer.)

Mr. Levit: I beg your pardon, he did answer that; that is correct, your Honor.

Q. (By Mr. Levit): There were some questions in your mind, were there not, in connection with your calculations as presented to the appraisers with reference to the figures you used on the profit obtained from the operation of the box factory after the fire? A. Some question?

Q. Yes, there was some doubt in your mind as to some of the factors that entered into the calculation of that box factory profit?

A. I do not recall that at this moment.

Q. Oh, refreshing your recollection, I will read to you from Mr. [90] Herrick's notes, which is Plaintiff's Exhibit T regarding your testimony given on the appraisal, page 125 in the transcript.

"He—meaning yourself—"stated that the computation of the rate of profit developed by Schedule P-1 and based on the average realization developed by the 58,000,000 sold through the fiscal year ending March 31, 1945, and that in computing the average, the average realization of such quantity had been applied against the average cost of the production of that year of 53,000,000 feet. He stated that there had been some question as to whether the average total realization should have taken into consideration the lumber sold out of inventory or only the lumber sold out of production, but it had finally been determined that the total lumber sold including that out of inventory should be combined with

(Testimony of Frank Momyer.)

the realization to lumber from conversion into shook."

A. That does not touch on the box factory problem, as I see it, Mr. Levit.

Q. Well, it touches on the question of the realization, doesn't it, from the lumber?

A. Yes, we sold in the year preceding the fire, called the test year, that is, the fiscal year ending March 31, 1945, we sold 58,391,343 feet of lumber either direct as lumber or through the box factory, and we only processed in that year 53,607,934 feet. So the average of 6.68667 was applied to the total [91] production of 53,607,934, to obtain the total profits prevented on the basis of production that we believed would be prevented for the year following the fire.

Q. Now, with regard to these O.P.A. prices, it is a fact, is it not, that the realization for lumber sold, that is, lumber prices under O.P.A. rose between '42 and '45? A. Rose?

Q. Let us put it this way, the O.P.A. ceiling prices on lumber processed by a mill such as yours in general and on box lumber in particular, rose between '42 and '45?

A. I think there were some adjustments in ceiling prices made during that period.

Q. Isn't it a fact that the price for box lumber went up from about \$40.74 to about \$45.12?

Mr. Whittaker: Still speaking of 1942?

Mr. Levit: Between '42 and '45.

(Testimony of Frank Momyer.)

A. The price for box factory lumber?

Q. Well, lumber realization generally under O.P.A.—I will withdraw the question and I will call your attention to this portion of Mr. Herick's notes of the hearing regarding the testimony of Mr. Lucas. Mr. Lucas was one of the accountants employed by Robinson-Nowell who were Pickering's accountants, was he not?

A. Correct.

Q. And you produced him as a witness at the hearing? [92] A. Correct.

Q. (Reading) "Mr. Lucas presented a memorandum re shook realization to show that while lumber realization increased slightly from 1942 to 1945, the realization through conversion into shook increased greatly. This"—and I presume it refers to this statement that Mr Lucas presented, on memorandum—"showed realization for 1942 of \$40.74 for lumber sold as such and \$27.76 for lumber converted into shook, whereas in 1945 lumber realization was \$45.12 while shook conversion produced \$51.90."

Do you recall that testimony? A. I do.

Q. And that accords, does it not, with your own knowledge of the conditions during that period?

A. To my general knowledge, and I can check the two figures, \$45.12 and \$51.90, that he quotes. I do not have before me and cannot check them.

Q. That is summarized by lumber on the one

(Testimony of Frank Momyer.)

hand and by shook on the other, and the lumber prices increased from \$40.74 to \$45.12 in those three years while the shook prices increased from \$27.76 to \$51.90 in the same three years; that is substantially a correct statement?

A. I think that's right, and as has been pointed out before the O.P.A. prices probably were set low on lumber suitable for the [93] box factory so that operators would not be encouraged to sell any such lumber on the market, but through the box factory, and make box shook because it was badly needed in the war.

Q. Do you recall that there was any reduction in the period from 1942 when O.P.A. went in, to 1945, any reduction in the price of lumber or box lumber, or any kind of lumber under the O.P.A. ceilings?

A. Any reduction?

Q. Yes. A. I don't recall any reduction.

Q. Reduction—reduction.

A. I don't recall any reduction, but in some cases a higher raise was applied to some grades or species than others.

Q. That's right." In other words over that three year period from the time O.P.A. went in until after the fire the price on lumber went up; it didn't go down.

A. It was generally going up.

Q. Yes, it was generally going up.

A. But this difference that I'm talking about could be created by raising certain grades of lum-

(Testimony of Frank Momyer.)

ber high and leave the others stand almost where they were, or not raising them so much.

Q. At the time that the O.P.A. fixed its prices on lumber, the policy of the government was to encourage the production of lumber as opposed to shook, was it not, because it needed that lumber for building cantonments and so forth? [94]

A. I think it was that they wanted the lumber worse, perhaps, than they did the box shook, because they were not shipping supplies abroad yet to any great extent.

Q. In other words, they were at that time trying to encourage the production of lumber as such and sale of the product as lumber rather than its diversion to remanufacturing process such as the box factory, weren't they?

A. I think they were doing that.

Q. It is a fact, is it not, Mr. Momyer, that when the original O.P.A. ceiling prices were fixed they were fixed on the basis of actual market at the time and they took into consideration actually when they were fixed, the industry-wide cost of production of the various grades and a reasonable profit thereon.

Mr. Whittaker: I object to the question as calling for the elements and factors that enter into the minds of the legislators in the legislative process; it calls for the conclusion of the witness, something he could not possibly know.

The Court: I think it does call for his conclusion.

(Testimony of Frank Momyer.)

Mr. Levit: I think the witness certainly must know at the time the O.P.A. prices were fixed on lumber in 1942 that they were fixed at a liberal level which permitted the manufacture of the lumber of the various grades including box lumber at the sale under the ceiling at a reasonable profit which, of course, this is an offer to prove——

The Court: Do you know that of your own knowledge? [95]

A. I did not, your Honor.

The Court: Did you have anything to do with the fixing, or did you sit in on any of the hearings, or were you or your firm consulted on the fixing of prices by the O.P.A.?

A. I do not believe we were, your Honor.

Q. (By Mr. Levit): In other words, you were not aware that was the fact or not; but, you do know at that time the policy of the government was to encourage the production of lumber and sale of lumber as such?

A. My information is that they had probably two reasons for doing this.

Mr. Whittaker: This calls for his conclusion.

The Court: I think it is hearsay.

Mr. Levit: I will withdraw the question.

Q. Now, Mr. Momyer, it was later, then, was it not, that the government decided to encourage the production of box shook, that is, the remanufacture process that took place, at the box factory, because of the fact that as I believe is alleged at

(Testimony of Frank Momyer.)

great length in the Pickering answer, that the shook was needed for shipment overseas, and that was after the O.P.A. prices were fixed, wasn't it?

A. I am sure it was.

Q. In order to accomplish that result the government raised the ceiling on box shook, did it not?

A. Yes, sir. [96]

Q. And it raised it to the approximate level as compared with the 1942 as we have seen; that is correct, isn't it?

A. I know it was raised. I don't know the exact levels except the figures that I identified here a while ago.

Q. Well, those are the figures used, and it accomplished that purpose, then, in that way and not—and you can correct me if I am wrong—and not by any reduction in the ceiling prices on box lumber; that is correct also, is it not? [96A]

A. I don't recall any reductions being made in box factory lumber, but as stated before, the differential could be created by raising other grades of lumber and leaving box factory lumber stand substantially as it was before any raise was considered.

Q. All right. Now it is a fact also, isn't it, Mr. Momyer, that a calculation, a determination of an allocated cost for the box lumber produced by Pickering in the fiscal year ended March 31, 1945, would be substantially less than the OPA price on box lumber, would it not?

(Testimony of Frank Momyer.)

A. Not on the method that I think would have to be used.

Q. Well, the method that you think would have to be used is an average cost method, isn't it?

A. Well, even if I subscribed to the allocated cost theory, which I do not, the common theory used there is that in relation to the selling price of the products, the cost is allocated; so on this page 3, schedule P-1, you will note that the average selling price of all lumber sold as lumber was \$46.28, whereas the fact realization for that same lumber was \$51.90. Therefore, on that theory, you would allocate a higher cost to the box factory lumber than you would to the lumber sold as lumber.

Q. Well, I think we understand each other all right, but we seem to be talking to cross purposes. I am talking about lumber on the green chain. In other words, I am talking about an [97] allocated cost of box lumber on the green chain as it comes out of the factory, based upon the OPA ceiling price, the in-place-value price.

A. But the theory of allocated costs is based on sales prices.

Q. You mean your theory of allocated costs?

A. We made no sale to the box factory. We merely processed that lumber farther through the box factory, as explained this morning and cut up small boards out of large boards and loaded them on the cars instead of the big boards. We didn't

(Testimony of Frank Momyer.)

make a sale until we put that shook in the car and sold it.

Q. Now you are aware of the fact, aren't you, Mr. Momyer, that Mr. Herrick in Exhibit S, which was a letter written by him at the request of Judge Barnett to Judge Barnett with relation to the position of Pickering as to the result of the appraisal—you are aware of the fact that Mr. Herrick stated in that letter, and I refer to page 113 of the transcript, line 9, "the danger of the foregoing argument—"; that is the argument that Judge Barnett had suggested—"is the fact that profit is not construed to be realized until sale takes place, and that consequently the production of each of the departments prior to final department should be valued at cost, which in this case would not be the average cost, for which you argue, but allocated cost. And upon such basis, the lumber used by the box factory and post-fire operations would be computed as costing at least several dollars less than the OPA prices, [98] which were adopted."

Did you disagree with that statement in regard to the relationship between a proper allocated cost and the OPA prices?

A. Yes, but would you read the statement that he made there again about the sale, that the sale was to be made——?

Mr. Whittaker: And to straighten the record, that is the letter, is it not, Mr. Levit, written

(Testimony of Frank Momyer.)

by Mr. Herrick to Judge Barnett after the appraisers' findings had been filed?

Mr. Levit: That is correct.

Now if the Court please, I think that this might be as good a time as any to read this letter to your Honor. Do you wish to take a recess?

The Court: Well, there is a long distance call coming for me. We will go ahead, but if I get up precipitously, you will understand.

Mr. Levit: I am nearing the end of my cross-examination, your Honor.

This is a letter on the letterhead of Lester, Herrick & Herrick, certified public accountants, dated March 1, 1948, addressed to Judge Paul V. Barnett, San Francisco, California: (Reading.)

“My dear Judge Barnett:—”

Judge Barnett, it will be stipulated, I am sure, was then acting as attorney for Pickering. [99]

The Court: Yes, I know.

Mr. Levit: (Reading.)

“In re Pickering Lumber Company, business interruption insurance claim.

In writing this letter I do not mean to infer any modification of my approval of the findings of the appraisers in the above-entitled matter. As I have explained to you orally, in a situation such as this there is no specific amount which can be asserted to be the correct valuation, and that all others are wrong, but rather that there is an area within

(Testimony of Frank Momyer.)

which any amount is appropriate of designation as a fair valuation.

The valuation found by the appraisers was in my opinion within that area. However, as the corporation has chosen to contest the findings, it is appropriate for me to give you such information and views as might be helpful in obtaining its objectives.

One of your basic contentions, as I understand it, is that the appraisers erred in using a market price for the lumber converted by the box factory after the fire. It is your contra contention that the charge into the box factory should have been at the average cost. I believe your [100] contention that the profit of the box factory after the fire should be based upon the average cost of all lumber produced is erroneous, without any foundation in accounting, and can be successful only by the application of some principle or claimed principle of law which will be wholly unrealistic and in disregard of accounting principles.

Lumber is a finished product in all of its several grades. All of the several grades come out of logs, which in general have an average cost, and it is perfectly true that from the standpoint of milling expense there is no difference between the cost of sawing a piece of lumber of low grade and pieces of lumber of high grade. It is also true that in determining the profit of a sawmill operation, there is no requirement for any segre-

(Testimony of Frank Momyer.)

gation of costs as between grades, because all of the costs are applied against all of the proceeds, unless there is appreciable variation in the grade percentages in the beginning and ending inventories.

It should be obvious that an accurate profit and loss statement would not result if the beginning inventory had nothing but clears in it and the ending inventory had nothing but commons or vice versa; because of this the practice of cost allocation is [101] well recognized in accounting. Under this method production cost is allocated between grades in the ratio of their value. This method has a sound basis in the principle that each piece of lumber produced should contribute to the cost of its production in ratio proportionate to its realizable value. Lumber, regardless of grade, constitutes a finished product, and its reworking into doors or pipe or box shooks becomes a supplemental operation, and it is fundamental that to determine the profit from each supplemental operation, the lumber consumed should be charged in at a price equal to that which could have been realized had the supplemental operation not taken place. This is a general practice among lumber and box manufacturers.

The Pickering Lumber Corporation determined box factory profit upon that basis, and I doubt that you could get any accountant to testify to the effect that that was not the generally accepted basis. It

(Testimony of Frank Momyer.)

was no surprise to me to be told by the other appraiser that he had consulted three or more accountants connected with lumber operations, who informed him that such was the correct basis. Under ordinary circumstances I do not believe that there could be any basis for arguing for any other method of determining the box factory [102] profit. In this case, however, the situation produced by the war and OPA prices opens the door, I think, to the contention that other methods should be followed.

At the time of the fire the company had a certain stock of lumber which it could make into boxes. Because the company had a box factory and because of the market price for shooks, it gave this lumber in its situs a peculiar value, much greater than the OPA price. Had the company been able to purchase lumber, it would willingly have paid \$40 or more per thousand, and had it not been for the OPA prices, it could have sold the lumber for \$40 or more per thousand. Accordingly, it may be argued that because of its locality and because the company had a box factory, the lumber had a value which should be recognized without regard to the artificial OPA prices. Frankly, I believe this argument pretty weak, but I give it to you for what it is worth.

Another argument which may be made carries out the argument which you have used, that in the case of Pickering Lumber Corporation, there was

(Testimony of Frank Momyer.)

what is termed an integrated operation, and that the lumber which was intended to be used [103] for the production of the box shook should not be considered a finished product. On such a basis the problem then becomes one of assigning to the various operations their contribution to the ultimate profit. In other words, while it is true from a legal standpoint that profit is not realized until the sale is consummated, it is unrealistic, viewing the three operations of logging, milling, and box factory, as merely parts of one total operation, to contend that all of the profit from the sale of box shook belongs solely to the box factory. In fact, were it not for the fact that lumber is a finished product, the recognition of this principle of the contribution of each department to the total profit is necessary of recognition in many use and occupancy settlements. For the purpose of testing this theory, I did make some preliminary computations, the result of which developed the loss as somewhat larger than that ultimately found. But because that computation was made before a number of other determinations, which would bear upon it, it would be necessary for me to completely recompute it if you were to care to use it. The danger—" and this is where I started reading when I asked the question—"the danger of the foregoing argument is the fact [104] that profit is not construed to be realized until sale takes place, and that consequently the production of each of the

(Testimony of Frank Momyer.)

departments prior to the final department should be valued at cost, which in this case would not be average cost, for which you argue, but allocated cost; and upon such basis the lumber used by the box factory in post-fire operations would be computed as costing at least several dollars less than the OPA prices, which were adopted. However, it is the general principle of U and O insurance that profits insured are the profits of production and not of sale. If it were not for this, the profit made by the sale of the lumber as lumber after the fire would have been considered as a loss recovery. Also, in Mr. Wither's testimony, he stated that in any use and occupancy policy covering an entire operation, it must be recognized that each unit was insured only to the extent it contributed to the whole profit. While Mr. Wither made this statement in connection with the allocation of overhead, the principle would apply also to the factor of profit. I know that the stain loss is very much in your mind. I would like very much to give you suggestions which might occur——"

The Court: Will you excuse me for a moment?

(Brief recess.) [105]

Mr. Levit: Your Honor, I believe I was just finishing reading the letter.

The Court: Yes.

Mr. Levit: I was on the last paragraph: (Reading.) "I know that the stain loss is very

(Testimony of Frank Momyer.)

much in your mind. I would like very much to give you suggestions which might support you on this question, but none occur to me.

Faithfully yours,

/s/ ANSON HERRICK."

The Court: That was written after the report was made?

Mr. Levit: That was written March 1, 1948.

Q. Now, Mr. Momyer, I will ask you again if that is not true, as Mr. Herrick states, that upon the basis of an allocated cost of the lumber that went to the box factory, that that allocated cost would have been at least several dollars less than the OPA prices which the appraisers adopted, namely, \$31.55?

Mr. Whittaker: Just a moment, I object to the question because counsel has not stated at what place he desires to indulge a sale—whether a fictional sale on the green chain or the actual sale of the shook.

Mr. Levit: I am not indulging any sale at all, counsel, I am simply trying to establish the fact as stated by Mr. Herrick, that an allocated cost to box lumber on the green chain [106] would be several dollars less.

The Court: That is it, on the green chain?

Mr. Levit: On the green chain. There is no sale question involved here at all.

The Court: Using OPA prices as a basis?

Mr. Levit: That is right.

(Testimony of Frank Momyer.)

Mr. Whittaker: That clears it up.

Q. (By Mr. Levit): Is that not correct, Mr. Momyer?

A. On the basis of forcing a sale there. We don't sell box factory lumber.

Q. That is correct, but on the basis of the sale——

The Court: What he means is that taking OPA prices for the box factory lumber on the green chain——

The Witness: If you do that, yes, your Honor.

The Court: If you take it on that basis, take the allocated cost, that would be less than the OPA price?

The Witness: If you take it at that point, it would be, yes, sir.

Q. (By Mr. Levit): As a matter of fact, it would be around \$25 or \$26, wouldn't it?

A. I have made no computation at all on it.

Q. Does that sound unreasonable to you?

A. I think it is a little lower than it actually would be. I don't know how much it would be.

Q. But it would be at least several dollars under the OPA price? [107]

A. That is what Mr. Herrick says, and I presume he made some computation. I have made none.

Q. With respect to the books of the Pickering Lumber Company, there were certain matters put before the appraisers, some of which we have al-

(Testimony of Frank Momyer.)

ready touched on, that indicated that the books were in some respects at least either in error or based upon matters that were matters of judgment and opinion rather than matters of fact. That is correct, is it not?

A. I don't know what you have in mind.

Q. Well specifically, I will call your attention to the fact that at the hearing I am sure you recall that you yourself testified that in respect to a number of items shown in the proofs of loss, the books have been in error or the claim was error or something was in error to the tune of maybe a thousand dollars or something of that kind. Do you remember that?

A. Yes, we called attention to the fact that in our proof of loss, after it was prepared and printed, we found that we had—I believe it was around \$800 or \$900 that should not have been in there, representing telephone calls that were made in connection with the sale of some property or in connection with some outside property, and should not properly have been included. And we called the appraisers' attention to that and asked them to take that out.

Q. And that was one of them, wasn't it? That was item, wasn't it? Now in addition to that, we have already noticed that you [108] stated to the appraisers with reference to the computation of realization figures, that there was some question as to whether that should be calculated in one way or

(Testimony of Frank Momyer.)

the other, but that you had decided to do it a certain way. Do you recall that?

A. Are you referring again to this fifty-eight million three hundred ninety-one thousand three hundred forty-three feet that was sold?

Q. That's right. A. In the year before.

Q. That's right.

A. Yes, I explained that, I believe, before.

Q. Now in calculating your excess logging costs, Mr. Momyer, it is a fact, isn't it, that you told the appraisers that the statement of overhead applicable to logging which you had used was—and I quote you—"pulled out of the air," and that there was no scientific basis for it. Do you recall that?

A. I said that we did not in our normal accounting procedures attempt to allocate overhead to any part of our operation, and that it was therefore something we had to do that we had not been doing, and we had to estimate some percentage or some basis of doing that. It was a new field for us.

Q. On what page will you find schedule R-1, can you tell me that? A. Schedule R-1?

Q. Yes. A. It will be found on page 21.

Q. Thank you very much. That is the schedule that deals with your logging computations, isn't it?

A. That deals with the overhead credit of sixty thousand one twenty-five nineteen.

Mr. Whittaker: Dollars?

The Witness: Yes, \$60,125.19, that we gave back

(Testimony of Frank Momyer.)

to the insurance companies as a recovery from this partial operation.

Q. (By Mr. Levit): Well, of course, the recovery was based upon your logging operation, the whole calculation was a calculation of your logging operation, and the appropriate amount to be credited back, wasn't it? A. That's correct.

Q. Yes. Now I call your attention to Mr. Herick's notes of the appraisal hearing, Plaintiff's Exhibit T, transcript of his deposition, page 127, and I ask you if this is a correct statement of your testimony in regard to this schedule R-1 relating to logging:

"It was explained that this had been prepared on the theory that by producing logs the value would absorb some of the continuing expenses set up in schedule two. Explained that the 85.7 per cent represented the estimated percentage of general overhead expenses which were applicable to the operation at Standard, and that the [110] remainder, or 14.3 per cent was considered applicable to the operation of Texas and other out of California properties."

Do you recall so testifying?

A. Yes, they had to be excluded because they were not covered by the insurance policies.

Q. And then immediately following that, is it not a fact that you stated that the 20 per cent of overhead estimated as applicable to logging had been pulled out of the air, but was believed to be fair.

(Testimony of Frank Momyer.)

“Upon questioning, he—” Mr. Momyer, “said that he knew of no basis that could be defended as a really scientific basis for allocation of overhead to logging.”

Do you recall so testifying before the appraisers?

Mr. Whittaker: He also so testified here.

A. I think that's right.

Q. (By Mr. Levit): Now you are aware of the fact, are you not, Mr. Momyer, that Mr. Herrick took the position that on the logging overhead, the company's allocation of 20 per cent, which really amounted to 25 per cent in comparison with the insurer's 44 per cent, was undeniably too low? You knew that, did you not?

Mr. Whittaker: Knew what, that that is what Mr. Herrick said?

Q. (By Mr. Levit): That Mr. Herrick took that position in [111] the course of the appraisal.

The Court: Read that question.

(Record read by the Reporter.)

A. I think that was discovered when Mr. Herrick's deposition was taken, some time after the findings were made. I don't—

Q. In order to refresh your recollection on that, Mr. Momyer, I will state that the statement to which I had reference is contained in Plaintiff's Exhibit V, which is a memorandum dated May 2, 1947, prepared by Mr. Herrick, and which he testi-

(Testimony of Frank Momyer.)

fied he prepared prior to the actual rendition of the award which was dated the same day?

A. But I did not see that document, because he prepared that for his own records. It was only in the depositions that that document was brought to light.

Q. Well, in other words, your testimony is that you don't know whether that is correct or not?

A. I think he made that statement in the deposition. I know that. But whether he made it prior directly to us, I do not believe he did.

Q. Now we have already referred—pardon me.

The Court: I don't believe I get the force of that statement that Herrick made. Does that mean that he thought that the overhead allocated to logging operations was too low?

Mr. Levit: Well, your Honor—

The Court: I mean allocated by Pickering.

Mr. Levit: The only point that we make—I couldn't myself, and I don't think the Court could, recompute all of these calculations. My point simply is that these figures that were presented to the appraisers were merely estimates; they involved matters of judgment, matters of accounting theory.

The Court: I got that. But—

Mr. Levit: That is all. I am not attempting to establish—

The Court: I am concentrating now on that statement of Herrick's. I don't quite understand it. Maybe I didn't follow it completely.

(Testimony of Frank Momyer.)

Mr. Levit: Well, my point is that it merely shows that the appraisers, and in particular Mr. Herrick in this case, did not accept the allocations and the figures that were contained in the proof of loss with respect to these calculations of logging overhead. He said they were undeniably too high, or too low—I don't care whether he said too high or too low. The point is that the appraisers undertook as a matter of fixing this award, making this award, to ascertain these things for themselves and in accordance with their best judgment.

I had just one other point that I wanted to refer to, your Honor, but I think that probably counsel will want to conduct some redirect, and if it is agreeable, I would let him do that now and not waste time looking for that last [113] reference.

The Court: You are aware of the fact that I am going to leave here early?

Mr. Levit: Beg your pardon?

The Court: You are aware of the fact that I have to go to leave here early?

Mr. Levit: Yes. I wasn't aware of the exact time.

Mr. Whittaker: In twelve minutes.

The Court: Yes. You don't need to hurry, because we can meet again at 9:30, if you would like to, tomorrow morning—unless it is a hardship on you.

Mr. Levit: I would think it would be advisable. I don't know how many more witnesses counsel

(Testimony of Frank Momyer.)

has. I will say this, that our case in rebuttal will be very brief, your Honor.

Mr. Whittaker: It would be a great convenience to us, if possible, your Honor, to conclude tomorrow.

The Court: Well, if not, we can proceed on Monday afternoon. There are some law and motion matters here Monday morning.

Mr. Whittaker: Shall I proceed?

The Court: Yes.

Redirect Examination

By Mr. Whittaker:

Q. Mr. Momyer, I desire to ask you just a few questions. I hope I may be direct and brief. First, I ask you with respect to the use of that word "depreciation" as included in item two of the insuring clause: Was that word [114] in the policies as originally furnished to Pickering?

A. The first policy——

Mr. Levit: Just a moment, I don't understand that question at all.

The Court: He is trying to bring out the point that as originally furnished, the policies didn't include the word "depreciation."

Mr. Levit: You mean that the form was changed after the policies were originally issued?

Mr. Whittaker: The policies were sent back and the insurance companies told that we wanted a specific coverage of depreciation, and the policies

(Testimony of Frank Momyer.)

were accordingly altered and that word "depreciation" was put in insuring item No. 2, where it appears in the typewritten portion of the policies now mimeographed in the exhibit before the Court.

Mr. Levit: If counsel says that it is the fact, I will stipulate to it.

The Court: Well, that is stipulated to then.

Mr. Whittaker: I say that is the fact, because Mr. Momyer has told me that that is the fact.

Mr. Levit: Well, I believe you. I don't think it is material, your Honor, at all when they were put in. That was the contract anyway.

The Court: Well, at any rate, it may have some bearing on how the contract would be construed—maybe it is to be [115] construed most strongly against the insuring company.

Mr. Whittaker: You will find it is a little odd, where it is situated in the policy. That is my point.

Q. Now, Mr. Momyer, I believe you have made it clear, but in one question, let's cover this matter. What is shook?

A. Shook, as we make it up there and the generally used term for shook, is that it is small boards used to make boxes.

Q. Do you make boxes? A. We do not.

Q. It is larger boards cut into smaller boards?

A. That is all.

Q. Now counsel for plaintiffs near the beginning of his cross-examination of you offered Plaintiff's Exhibits I and J, which were letters written by

(Testimony of Frank Momyer.)

you to Mr. Wither in connection with the settlement of the direct fire loss on Pickering's plant, did he not? [116]

Q. Now those policies of insurance indemnified Pickering to the extent of the actual cash value of physical structures destroyed by fire?

A. That is correct.

The Court: And also stock, as I understand it.

The Witness: Stock.

Q. (By Mr. Whittaker): And also stock in process of manufacture?

A. That's right. There were two different policies involved besides the U and O, one being on the stock alone and one being on the buildings and machinery, the physical properties.

Q. Now were those direct fire policies reporting form policies?

A. The stock policy was a reporting form policy.

The Court: By that you mean periodically you had to report the amount of inventory?

The Witness: At the end of each month you had to report the amount of inventory.

Q. (By Mr. Whittaker): You make a deposit premium to being with and then you report monthly, do you not? A. That is correct.

Mr. Levit: It is called "provisional insurance," in other words.

Mr. Whittaker: Yes.

Q. And then the premium is adjusted at the end of the period? A. That is correct. [117]

(Testimony of Frank Momyer.)

Q. Now next, counsel for plaintiff has directed attention to the fact that in the Robinson-Nowell report, there are found certain prices of lumber not sold but set down on O.P.A. price basis. You have testified that that was for informational purposes of the company only, have you? Is that right?

A. Yes. You are referring to the charge to the box factory for the lumber?

The Court: Charged to the box factory at the end of the green chain for lumber.

Q. (By Mr. Whittaker): Is that right, is that what it is? A. Yes.

Q. All right. Now counsel for the plaintiff has also called attention to the fact that within that report are certain figures purporting to show an allocated cost for light lumber using O.P.A. prices at the green chain, is that right?

A. Yes. You are referring to the allocated cost for income tax purposes?

Q. Yes.

A. On the basis of nine segregations?

Q. Yes.

Mr. Levit: Pardon me, your Honor. We have been putting quite a bit of emphasis on this expression, "at the green chain."

The Court: I understand.

Mr. Levit: The only significance of that is, as I understand it, as far as I know, when lumber comes out of a sawmill, [118] this particular grade of it, it is called "box lumber," and from that point

(Testimony of Frank Momyer.)

then it is put into the box factory. Now I don't think, as far as I know, there is any distinction between whether it is on the green chain or out in the yard or whether it is at the door of the box factory.

Mr. Whittaker: We ought to say "the diversion point," to be accurate.

Mr. Levit: That's right.

The Court: I understand what you mean.

Q. (By Mr. Whittaker): Yes. Now, Mr. Momyer, addressing our attention to this so-called allocated cost, these nine groups, how many different grades and selling prices of lumber was Pickering producing in the year 1945?

A. I would say well over a hundred.

Q. Now then, is this what was done: there were nine different groups made up, embracing nine different sales steps or prices, rather, in the lumber sold as lumber?

A. No, those nine groups included a grouping of various prices in each group. In other words, we didn't separate each and every sale by the actual price of the sale. One group took in the uppers, for instance, and the prices in that group for uppers, which varied according to thickness and grade and so on, were grouped there.

Q. All right. Now that is in one group, is it?

A. That is in one group. [119]

Q. Now how do you arrive at the price used within that group?

(Testimony of Frank Momyer.)

A. Well, that would be on the basis of the sales made in that group at varying prices.

Q. Well, but what I mean, what I am getting at, is, you say you had numerous different sales prices of lumber within that one group. Now how do you come out with one single price?

A. You average that for the group.

Q. That is the point. Then each one of the groups is an average of all the selling prices of the lumber within that group, is that right?

A. That is correct.

Q. That is what I wanted to get over. So that is not a true allocated cost?

Mr. Levit: Just a moment. I object to the question on the ground that it is leading, and this is redirect examination—it is not cross-examination.

The Court: Well, I think it is quite obvious.

Mr. Levit: It is obvious that it is not an allocated cost in the way the witness says you have to allocate cost, by a hundred grades, but it is an allocated cost in the way it is usually done in the lumber business.

The Witness: No, it is not, counsel.

Mr. Levit: Well, that is our position, at any rate.

Mr. Whittaker: Now just a couple of more questions.

Q. To be sure that I am clear that this matter is in the record, [120] I believe you stated that the realization for box shook in the year 1945 in the

(Testimony of Frank Momyer.)

three months preceding the fire, after deducting the manufacturing cost in the box factory, was \$51.90 per thousand?

A. That was for the fiscal year ending 3/31/45, Mr. Whittaker.

Q. Was it—— A. That test year.

Q. The test year. Now what was the overall realization after deducting any appropriate costs as in the previous year for finishing in the planing mill, of the lumber sold as lumber?

A. \$45.12.

Q. Now you actually sold the shook that was made in the box factory after the fire, didn't you?

A. We did.

Q. And what was the actual realization thereon?

A. On the same basis as the figure we quoted, it was \$47.60.

Q. And including the manufacturing cost to the box factory and the selling cost, you brought that figure up to the \$53, haven't you?

A. Well, this is the period following the fire—the other was the period preceding the fire.

Q. Yes. But I say, adding on, now, the box factory manufacturing costs and the selling costs of the shook and the underrun, you came out, as you have previously testified, with this \$53.51 actual cost against a realization of \$60.22, and a net profit [121] therefore of \$6.71 per thousand?

A. Oh, yes, we have the gross realization, sales realization was \$6.22 and after taking off costs,——

The Court: That is after the fire?

The Witness: After the fire.

(Testimony of Frank Momyer.)

A. (Continuing): —we obtained \$6.71 per thousand realization.

Q. (By Mr. Whittaker): Now, Mr. Momyer, I think this is obvious; it was advanced by Mr. Levit as a theory that in an accounting period wherein all the production has been actually sold and converted into money, you come out at exactly the same place, whether you use actual or allocated costs?

Mr. Levit: Just a moment. Counsel is mistaken in using the term “actual.” He should have said “average.”

Q. (By Mr. Whittaker): Well, I will adopt that word “average.”

The Court: No matter what cost basis you use, it came out the same.

Q. (By Mr. Whittaker): The same place?

A. Sure, because——

Q. Now this question: Did you in the accounting period after the fire sell all of the production?

A. Of the box factory?

Q. Oh, yea. A. Yes, we did.

Mr. Levit: Is it your contention, counsel, that you will come out with the same profit from the box factory whether you [122] use the average cost that the witness used or whether you use allocated cost? Is that what you are driving at?

Mr. Whittaker: Now I will develop the matter—of course I know the Court has got to get away. I have kept you five minutes too long.

The Court: That is all right. Suppose we con-

(Testimony of Frank Momyer.)

tinue now until 9:30 in the morning and maybe we can go right on through to 4:30 in the afternoon and get through with the thing.

(Whereupon a recess was taken until tomorrow, Friday, June 10, 1949, at 9:30 A.M.)

Morning Session

Friday, June 10, 1949, at 9:30 o'Clock

The Clerk: American Insurance Company vs. Pickering Lumber Company, on trial.

Mr. Levit: Your Honor, before we proceed with the examination of the witness that was on the stand, I would like to make a brief reference to Plaintiff's Exhibit X for identification. That statement was prepared for us by Mr. Baker, who is an accountant for the insurance company, and he tells me this morning that Mr. Momyer was correct in his statement that the \$55,000 item actually was included in the claim in the \$742,000 total. So I want in all fairness to point that out. I don't think that it has any bearing whatever on what is intended to be presented by this presentation; it was just intended to summarize the differences between the appraisers on one hand, the insurance company's computation, and the claim on the other. I think it probably does that, but it is purely a matter of argument, and we will not attempt to offer it because Mr. Momyer was correct in his criticism that in the claim column, that \$55,000 item was not in addition to——

The Court: It was a depreciation item, a part of it, wasn't it?

Mr. Levit: Well, the \$55,000 item was depreciation, and the decking cost and some other items.

The Court: You added them in twice? [124]

Mr. Levit: That's right, your Honor.

The Court: All right, proceed.

Mr. Whittaker: Mr. Momyer, please.

FRANK MOMYER

resumed the stand; previously sworn.

Redirect Examination

(Resumed)

Q. (By Mr. Whittaker): Mr. Momyer, did the insurance companies, the plaintiffs, through their auditor, Mr. Baker and others, actually examine Pickering Lumber Company's books prior to the time the proof of loss in evidence was filed with the insurance companies?

A. Yes, they did. Mr. Baker and some other members of his staff spent several days at our plant at various times, I believe, and secured data there that they wanted. We gave them full access to the books and records there.

Q. Did you in computing profits prevented in the proof of loss, both for the nine months' period and the one year period following the fire, deduct depreciation on the sawmill that occurred in the test year, which sawmill was later destroyed by fire?

(Testimony of Frank Momyer.)

A. I did.

Q. Then to see if I understand, in computing profits prevented, you take in one column the gross profits that would have been made under the formula of the test year, in another column the [125] expenses that would have been incurred, including depreciation on the sawmill that was destroyed by fire on July 7, 1945; then you deduct the total of those expenses from the gross income and the balance is the amount of the profits prevented; is that correct?

A. That's correct. It was six sixty eight in this case, as shown by the proof of loss.

Q. Now I think this is already in the record, but I am not sure. We have talked about it, all of us, but I am not sure the record shows the fact. Explain to the Court whether O.P.A. prices are simply X dollars, or X dollars plus freight from basing point of Susanville, California.

A. The O.P.A. prices include the base price and the freight on the Susanville rate.

The Court: Freight differential, you mean?

The Witness: Well, you develop the differential by the freight from Susanville less the actual freight to destination. In other words, if the freight from Susanville is 30 cents per hundredweight to Modesto, and the actual rate from our plant at Standard to Modesto is 10 cents or 15 cents—I don't remember the exact rate—then your differential, your savings there, is the difference between 30 cents and 15 cents, or 15 cents per hundredweight. Because you only

(Testimony of Frank Momyer.)

have to pay freight on the actual rate. Therefore you save in your pricing of that lumber the difference between 15 cents and 30 cents, and that is a part [126] of the price that you are allowed to charge for that lumber.

The Court: In other words, you are allowed to charge 30 cents for the lumber?

The Witness: That is correct, even though you do not have to pay it.

The Court: Even if it doesn't cost as much?

The Witness: Yes, even if it doesn't cost as much.

Mr. Whittaker.: I think that is all. Thank you.

Mr. Levit: Your Honor, this will be brief, but I am not sure that all of my questions will be strictly re-cross. I said yesterday that I wanted to review my notes, that I have one or two other questions that I would like to ask if counsel and Court will allow.

Re-Cross Examination

By Mr. Levit:

Q. Now on this question of depreciation on the sawmill that burned, Mr. Momyer, that was an item that of course into the calculation of your net profit, but you say it wasn't included in there. In other words, when you calculated the net profit for the test year, you deducted as an expense the item of depreciation on the sawmill; that's right, isn't it? That is what you said?

(Testimony of Frank Momyer.)

A. Deducted that from the gross realizations to arrive at the net profit.

Q. My impression was that the claim—that that was one of the items that was omitted also from the continuing charges, fixed [127] charges and continuing expenses for the test year. You remember there were two items that went to make up the insurable values, the net profit is one and the fixed charges and continuing expenses was the other?

A. It was not omitted for the test year as far as profits were concerned, and it was not included in our claim, either in the nine month period of the twelve month period of continuing expenses following the fire. It was eliminated from both the nine month period and the twelve month period, but in order to calculate the correct profit, you would have to assume an operation that would be consistent with the test year, and of course the mill still existed during the test year, and naturally you would take off the depreciation in calculating the net profits. Otherwise you would get too much profit.

Q. All right. Well then, it was not correct, as Mr. Whittaker's question implied—and that is what I was getting at—that in calculating the net profit for the test year you eliminated consideration of the depreciation on the sawmill?

A. We deducted it.

Q. You mean you did actually deduct it?

(Testimony of Frank Momyer.)

A. We actually deducted it.

Q. From the gross realization to determine the net profit? A. Correct.

Q. Certainly.

Mr. Whittaker: That is what I said, I believe, isn't it? [128]

The Court: That's right, that is what he said.

The Witness: That is correct.

Mr. Levit: Well, your Honor——

The Court: I got the impression that they did that in determining net profit because in determining net profit in a test-year they would have to transpose that to the year of the fire and they would have to assume the sawmill was up in order to determine profit. They would have to deduct depreciation from that.

Mr. Levit: That is exactly my point, your Honor. I just misunderstood then.

Q. Then when you added to the net profit the fixed charges and continuing expenses for the test year to determine insurable values, that is, the fixed charges and continuing expenses that would have been earned normally, and so forth, then you eliminated the item of depreciation on the sawmill from that computation, didn't you?

A. Because the sawmill did not exist, and we didn't——

Q. I don't think you understood my question.

(Testimony of Frank Momyer.)

You eliminated the depreciation on the sawmill in determining the insurable values so far as the item of fixed charges and continuing expenses was concerned, did you not? A. That is correct.

Q. So that you included the item when you calculated the net profits for the test year; in other words, in computing your net [129] profit from your gross realization all of your expenses and one of the expenses included in that computation was the depreciation on the sawmill, wasn't it?

A. Yes, sir.

Q. Well, when you came down to figuring your fixed charges and continuing expenses for the test year, you eliminated that item, didn't you?

A. I did.

Q. You didn't take it into consideration at all?

A. I did.

Q. You mean you did not take it into consideration? A. Did not take it into consideration.

Q. Right. And——

The Court: What would the ultimate result be? One would cancel the other out?

The Witness: That is right, that is what happened.

Mr. Levit: Well, your Honor may bear this in mind, that the policy insured two separate items; it insured net profits and it insured fixed charges and continuing expenses. Now the whole point at issue here is a comparatively simple one. They included in their calculation of net profit for the test year,

(Testimony of Frank Momyer.)

for obviously correct reasons, the amount of depreciation on the sawmill. But when they came to the second part of their calculation of insurable values, the fixed charges and continuing expenses that would normally have been earned during the test [130] year, they eliminated that item from consideration entirely. Now when the appraisers came to make their award, they immediately noticed that, and properly, as we will show—I mean, it seems perfectly obvious—added back that \$15,000 to the fixed charged and continuing expenses.

The Court: That is one of the points in dispute.

Mr. Levit: Yes, that is one of the points in dispute, that's right.

Q. Now, of course in figuring your loss of fixed charges and continuing expenses, you did not include any proportion of the depreciation on the sawmill because actually, since the sawmill was burned, there was no actual depreciation on it, is that not correct?

A. We did not include it.

Q. Yes. Now Pickering Lumber Company in this appraisal, Mr. Momyer, did not take the position that the method by which Pickering kept its books was controlling on the appraisers, did they?

A. I would say not.

Q. In fact, it was clearly understood at all times by everybody, including Pickering and the appraisers, that if the appraisers considered that the books, the method of keeping the books, was er-

(Testimony of Frank Momyer.)

roneous, that they could reject them, isn't that so?

A. We made no effort to control the appraisers in their findings. [131]

Q. Isn't it a fact that in the brief which you presented to the appraisers through your counsel, Pickering Lumber Corporation's, that on page 11 at the bottom you said, "It is well settled that the method by which the assured's books are kept is not controlling, since the policy insures against the loss of profits, not against the result shown by an erroneous method of keeping books"; you recall that statement in the brief that was submitted to the appraisers, do you not?

A. I certainly do.

Mr. Whittaker: I may save time on it. We certainly so contend today.

Q. (By Mr. Levit): And you told the appraisers again on page 22, did you not, that "while it is true that in computing the profits prevented the appraisers should disregard any erroneous entries on Pickering's books," and so forth—you told them that they should do that, isn't that a fact?

A. That is what our counsel told them. You must realize I am not a lawyer, and what he says there is his own words, not mine.

Q. At the same time, you were at that time the chief accounting officer for the Pickering Lumber Company, were you not? A. Correct.

Q. And you were following this claim very

(Testimony of Frank Momyer.)

closely, and it was your responsibility to do that, wasn't it? A. That's right. [132]

Q. And you were consulted, were you not, with respect to statements about the books and the figures of Pickering Lumber Company by the attorneys in the course of all of this appraisal?

A. I certainly was.

Q. And you told the appraisers too, didn't you, in the appraisal—or Pickering did—that if the appraisers felt that there was a more equitable method of determining the profit on the box factory than by the use of average costs, that the appraisers were free to use that more equitable method?

Mr. Whittaker: Are you referring to what is in the brief, Mr. Levit?

Mr. Levit: Yes, I am referring to page 43 of the brief.

Mr. Whittaker: Then I submit that it is in evidence and that it speaks for itself. It was not a document prepared by this witness.

The Court: Well, I know, but if you are referring to the brief, why, I think the objection is good. But the question didn't refer to the brief. The question referred to what this witness did.

Mr. Whittaker: What this witness said, that's right.

Q. (By Mr. Levit): Can you answer the question?

A. I would say, Mr. Levit, that I again did

(Testimony of Frank Momyer.)

not try to control the appraisers, I tried to give them our side of the case.

Q. But I mean, it was Pickering's understanding, and the mutual [133] understanding of Pickering, the insurance companies and the appraisers that the appraisers were free to reject any methods or any entries on the Pickering books that they thought to be erroneous; that was understood, wasn't it?

Mr. Whittaker: That calls for a conclusion.

The Court: That calls for a conclusion, counsel, yes.

Mr. Levit: All right, I will withdraw it.

The Court: The way you framed your question in the first place was whether or not he made the statement to the appraisers.

Mr. Levit: I realize that, your Honor.

The Court: And that question could be answered, but he hasn't answered that question.

Q. (By Mr. Levit): Mr. Momyer, I understood you to say on direct examination that the matter of an underrun on the box factory was the usual thing in the box factory operation; did I understand you correctly?

A. As a general rule it is, yes, sir, although there have been years when because maybe we sent over some waste material that it wasn't practical to try to measure the footage on, just a little bit of scrap here and there, that we might have encountered an overrun and during the period of

(Testimony of Frank Momyer.)

O.P.A. ceiling prices, there were cases when they allowed you to charge, say, for a two inch board when in fact you only used an inch and a half board in the manufacture of certain box shook. Therefore that would create an overrun because you are dealing then with [134] the footage that was allowed under the regulations to be charged to your customer, but such footage was not actually put into production of the shook.

Q. But it is a fact, is it not, that the test year which all parties agreed was to be taken as the basis for calculation, did show an overrun in the box factory, did it not?

A. I am sure that is true.

Q. Yes.

A. But after the fire we had an actual experience, and that actual experience did not develop an overrun.

Q. Now one more question. You testified regarding the matter of freight differential at some length, and I believe you pointed out that the average that you calculated was 69 cents, freight differential per thousand feet.

Mr. Whittaker: Average?

Mr. Levit: Average.

A. I think that was a figure that appears in some of our calculations, and as I explained to you at the time, it includes all sales of lumber which are shipped all over the United States, some going to the Far East, and those grades of lumber would

(Testimony of Frank Momyer.)

not in all cases produce a freight differential. In other words, it would cost you as much actual freight as the basing point of Susanville, because the freight rate in a lot of cases going to New York or Philadelphia or some eastern points are exactly the same as from Susanville, that they are from Standard. But [135] we wouldn't ship the type of lumber that goes in a box factory to a point of that kind, because we can sell it here, where it is used in California, and that is where we would sell it if we were going to sell it on the market—is where we could obtain the best advantage from selling.

Q. And I think you also testified, Mr. Momyer, did you not, that in general the freight differential was earned largely on the upper grades of lumber and that on box lumber the freight differential was smaller and minor?

A. No, I wouldn't say that.

Q. You wouldn't say that?

A. No, because freight rates from Susanville to Modesto are the same, whether it is high grade lumber or low grade lumber, and the actual freight from Standard to Modesto is the same regardless of whether it is high grade lumber or low grade lumber. They charge you on the weight, not on the grades or anything pertaining to grades.

Q. What would you say, then, was a proper figure for freight differential on the average, if the 69 cent figure was not correct, which you used for

(Testimony of Frank Momyer.)

a presentation of your claim to the insurance companies?

A. We made no freight differential claim to the insurance companies. They asked us for some figures on it, and we gave them some figures on the basis of Modesto.

Q. But you did present to the insurance companies in connection [136] with the stock loss certain figures, and all of those figures related to freight differential of 69 cent average. Those are the figures that you used in calculating your own inventories, aren't they?

A. I think so, and I think we were liberal in giving them that basis, because we took the average from experience, and the lumber that was on the green chain was made up of various grades and species. Therefore we tried to be fair in that and take the average.

Q. How much did the appraisers take into consideration as freight differential in fixing the price on the lumber to the box factory?

A. I have said it before, I believe, that I have no information on that. The appraisers did take some figure, but I do not know. The figure that we have seen is a charge to the box factory for that lumber, and that is, I believe, \$31.55, and it is not broken down. We are told that it is the O.P.A. sale prices, and that a freight differential was considered but what that is I do not know.

Q. Aren't you aware of the fact that the ap-

(Testimony of Frank Momyer.)

praisers allowed a freight differential in that \$31.55 figure of \$1.71?

A. They have said they did, but I do not believe that I know the amount that they did include in there.

Q. All right.

Mr. Levit: I believe that is all. [137]

Further Redirect Examination

By Mr. Whittaker:

Q. Just on that question if I may ask one more. You have read Mr. Herrick's deposition; I think you did, have you not, Mr. Momyer?

A. Well, I believe I have, Mr. Whittaker. It has been some time ago since I read it.

Q. In that he states that they allowed O.P.A. prices and then indulged a "theoretical sale" of one half of the lumber that was manufactured into shook after the fire for delivery to Modesto and the other half at Fresno, and in that manner they obtained the freight differential, and then they averaged the differential between the two, as I think you will see he testified.

The Court: Who did this?

Mr. Whittaker: The appraisers.

The Court: The appraisers?

Mr. Whittaker: Yes. That is what Mr. Herrick testified.

Mr. Levit: What they did, counsel, was that they were trying to give the insured a break on the freight differential, and they took a favorable

(Testimony of Frank Momyer.)

one and they got it more or less in that way, and it came out to \$1.71.

Mr. Whittaker: I am just merely trying to tell your Honor what the testimony in Mr. Herrick's deposition is.

The Court: Yes.

Mr. Whittaker: That is all, Mr. Momyer. Thank you, sir. [138]

(Witness excused.)

Mr. Whittaker: May we have just a half minute, your Honor?

The Court: Well, I think it is almost ten o'clock. Before you go on with anything else, let's call the calendar. Well, we have to wait on the United States Attorney, so you may go on.

Mr. Whittaker: Just a half minute, if you please, your Honor.

(Slight pause.)

The Court: You may proceed.

Mr. Whittaker: If the Court please, the defendant rests.

Mr. Levit: I think perhaps we had better wait until after ten o'clock, your Honor. We have a witness in rebuttal, your Honor.

(Whereupon, following the calling of the calendar, a brief recess was had.)

The Clerk: The case of American Insurance Company and others vs. Pickering Lumber Company, for further trial.

ROLLIN P. RODOLPH

called on behalf of the plaintiff in rebuttal, sworn.

The Clerk: State your name to the Court.

A. Rollin P. Rodolph. [139]

Direct Examination

By Mr. Levit:

Q. Mr. Rodolph, you are an accountant, are you not? A. Yes, I am.

Q. And you are the senior partner of the firm of Rollin P. Rodolph & Company?

A. Rollin P. Rodolph & Company.

Q. And what is the business of that firm?

A. Certified public accountants and doing auditing, tax work and other accounting work including cost work.

Q. How long has that firm been in existence?

A. Since July 1, 1940.

Q. And where is it located?

A. In San Francisco, and with offices in San Francisco and Klamath Falls, Oregon.

Q. And you yourself live in San Francisco, do you, Mr. Rodolph? A. I do.

Q. But you spend a good deal of time in Klamath Falls?

A. And other places out of San Francisco.

(Testimony of Rollin P. Rodolph.)

Q. Yes. But you have an office—your firm has an office in Klamath Falls? A. It does.

Q. Now what is the major purpose of maintaining an office in Klamath Falls?

A. The Klamath Falls office was started to serve our clients in [140] the district, most of which were lumber concerns.

Q. Yes. And what would you say of the total practice of your firm as represented by lumber clients? A. At least 40 per cent.

Q. And how many lumber companies roughly would you say your firm represents for these purposes?

A. Well, the last time I counted, there were between 40 and 50 lumber operators.

Q. Will you name just a few of your more important lumber clients?

A. Well, Mt. Whitney Lumber Company, Clover Valley Lumber Company, Aewanee Box Company, Big Lakes Box Company, American Box Corporation.

Q. Do you do any work for Weyerhaeuser?

A. We are consulted by Weyerhaeuser Timber Company on their operations in Klamath Falls, yes.

Q. And Weyerhaeuser, I believe, is one of the largest, if not the largest, lumber operators in the world, is it not? A. I think so.

Q. Now for these concerns, what is the nature of your work? These lumber concerns?

A. Well, it varies. Accounting practice varies.

(Testimony of Rollin P. Rodolph.)

We do auditing for some of them; others, cost work; others, tax work.

Q. And do some of these firms that you represent operate box factories?

A. A large number of them do. [141]

Q. And do some of them have what we may call an integrated operation, which would include the actual logging of timber and the putting of timber through sawmills and through box factories?

A. Yes.

Q. Now you said that since 1940, that has been your occupation. Prior to that, with particular reference to the period from 1924 to 1936, what was your occupation, or what was your connection?

A. Well, from 1919—actually from 1918—to 1940, I was either an employee or a partner of Robinson-Nowell and Company. With reference to the years 1924 to 1936 I had done for that firm considerable cost comparisons of different lumber mills in northern California and southern Oregon district. I had also made some general cost comparison, I believe, in 1935, of a large number of mills in the California area.

Q. From the years 1927 to 1936, it is a fact, is it not, that you were a partner in the firm of Robinson-Nowell and Company?

A. That is true.

Q. And I believe you stated then that between 1924 and 1936 you made as a part of your work with that firm cost comparisons of lumber operations?

A. I did.

(Testimony of Rollin P. Rodolph.)

Q. About how many of those a year do you suppose you made over that period? [142]

A. Well, it was an annual report during those periods. Where we went into the operations and analyzed the cost for the year, showed each operator the costs as we had rescrambled them for him, and the consolidation of the whole district, also the lowest cost.

Q. And did that study include allocation of costs as between box factory and other operations of these concerns? A. Yes.

Q. You are a graduate of the University of California, are you not? A. That's correct.

Q. And you got your A.B. in 1918?

A. Correct.

Q. When did you first enter the profession of public accountancy?

A. After World War I, on December 27, 1918.

Q. And when did you pass your C.P.A. examination in California? A. In November, 1919.

Q. And when did you do your first lumber accounting work?

A. Sometime in 1919. I presume it was along in May or June.

Q. Are you the author of any books in connection with lumber, lumbering operations?

A. Well, the only thing that I did along that line was, I made the outline for the extractive industries for the Golden Gate College, and taught

(Testimony of Rollin P. Rodolph.)

there a year or two. Subsequently that was expanded and published. [143]

Q. And when you said "extractive industries," I take it you intended to include the lumber industry?

A. The lumber industry was included.

Q. Now do you recall in 1933 that you represented the National Wooden Box Association?

A. Yes, I did.

Q. The National Wooden Box Association consisted of box factory operators, did it not?

A. It did.

Q. And did some of the operators have also what we call an integrated process, from logging to box factory? A. A portion, yes.

Mr. Whittaker: That is in 1933?

Mr. Levit: 1933, yes.

Q. Now for what period did you represent the box association?

A. That was done to set up the N.R.A. code. I assembled the figures.

Q. What did you do?

A. I assembled the figures here and spent, oh, two or three months in Washington at different times determining or proving to the N.R.A. that the average wage cost was not exceeded by the prices that were set up in the N.R.A. code.

Q. Now the N.R.A., of course, so far as price fixing went, was a minimum price fixing operation, wasn't it? A. That's correct. [144]

(Testimony of Rollin P. Rodolph.)

Q. And as I understand it, then at that time you assembled cost figures on box factory operations for the purposes of the N.R.A. prices with respect to box shook, isn't that right?

A. That's correct, I had the figures on practically all the operators in the West, and we represented 65 per cent of the production in the United States of boxes.

Q. Now in 1942 do you recall that you represented a group of box factory operators and again assembled costs for another purpose?

A. Yes, I did.

Q. What was that purpose?

A. It was for representation before the Office of Price Administration on the prices of shook that were being published at the time. We assembled costs from practically all the box factory operators and presented those figures to the executives in control of prices for box shook in the O.P.A.

Q. Yes. And will you tell us, please, whether or not in compiling those cost figures for both the N.R.A. and the O.P.A. purposes, it was necessary to determine a price at which the box lumber was costed into the box factory operation?

A. It was.

Q. And on what basis did you determine that price?

A. Well, in the N.R.A. days the box prices were determined by the price that was set up for the

(Testimony of Rollin P. Rodolph.)

lumber and those were used in the figures. [145]

Mr. Whittaker: Pardon me just a moment. So that I may understand, those are the prices you used, aren't they?

Mr. Levit: That's right.

Mr. Whittaker: That is what I understood.

The Witness: Yes.

Mr. Whittaker: That is what I understood, but I wanted to be clear about it.

The Court: Those are the prices he gave to the N.R.A.?

Mr. Whittaker: Yes.

Mr. Levit: Well, in other words, if I understand you correctly, in costing lumber into the box factory operation, in the N.R.A. days you used N.R.A. prices on box lumber? A. That's correct.

Q. Those were market prices, were they not?

A. They were mill prices.

Q. But they represented in place of market value in your calculations, did they not?

A. That's correct.

Mr. Whittaker: If the Court please, I think that question is leading.

Mr. Levit: I think it is leading. I am sorry.

Mr. Whittaker: He said he used the minimum values, and we all know that is right as a matter of law.

Q. (By Mr. Levit): Now when you presented or made up your cost calculations in 1942 for the O.P.A. purposes, what figures [146] did you use as

(Testimony of Rollin P. Rodolph.)

a basis for costing the box lumber into the box factory operation?

Mr. Whittaker: Just a moment. If the Court please, we object to the question for the reason that it is wholly immaterial what the figures are that the witness used in his presentations to the price administrator. The concern here is what the administrator from time to time published and what was in effect in 1945 under the plaintiff's theory.

The Court: Well, that may be true. On the other hand, there is question here about what is a proper accounting procedure, and this may throw some light on that.

Mr. Levit: Well, this is just a beginning, your Honor; I am going on to that point.

A. The price used was the market price at the time, the box lumber.

Q. (By Mr. Levit): In other words, the market price for box lumber. And in preparing your cost figures, did you use that price regardless of whether the mill in question, whether the operator in question was merely a box factory operator or operated an integrated operation?

A. It was used on the same basis for all mills; that is, market price.

Q. Yes. Now will you tell us, please, whether in your opinion that basis which you used in 1942 in determining the costs of box factory operation was a sound and proper accounting basis [147] and

(Testimony of Rollin P. Rodolph.)

in accord with recognized accounting principles?

Mr. Whittaker: We object to the question for the reason that it is wholly immaterial and irrelevant to any issue before the Court.

The Court: Well, I think it is preliminary. I will allow the answer.

Mr. Whittaker: I hope your Honor will understand that I am trying to protect my record.

The Court: Yes.

The Witness: I am sorry, would you read that?
(Record read.)

A. It was.

Q. (By Mr. Levit): Now when the O.P.A. fixed the prices for box lumber in 1942, did they base those prices, if you know, on then existing market prices?

Mr. Whittaker: Just a moment, if the Court please; we object to that question as hearsay and as calling for a conclusion and reading minds of the legislative body.

The Court: Yes, I think that goes pretty far, Mr. Levit.

Mr. Levit: I will reframe the question. I think perhaps I can get at it in this way:

Q. Are you familiar with the general level of box lumber prices as they existed in 1942 prior to the issuance of O.P.A. ceiling prices?

Mr. Whittaker: We object to the question as immaterial [148] and irrelevant to any issue here.

The Court: I will let him answer that.

(Testimony of Rollin P. Rodolph.)

A. In a general way, yes.

Q. (By Mr. Levit): And are you familiar with the prices, the ceiling prices, which the O.P.A. affixed in relation to box lumber?

A. Yes, in general.

Q. And will you tell us, please, what was the general relationship between the two sets of prices?

Mr. Whittaker: Just a moment, if the Court please; I object to the question as immaterial to any issue here, irrelevant and calling for a comparison of matters of law.

The Court: Well, I will let him answer the question.

A. The market price, as I remember it, of box lumber, was slightly above the price that was set when the first lumber price schedule came forth. The price which was set, as I remember it was \$25.50 per thousand feet.

Mr. Whittaker: That is in '42, Mr. Witness?

The Witness: In 1942.

A. (Continuing): And as I remember it, the price of box lumber was slightly in excess of that in the market at the time.

Q. (By Mr. Levit): How much in excess, do you recall?

A. A dollar or two.

Q. And at that time is it or is it not correct, if you know, that the policy of the government was to encourage the production [149] of lumber and to discourage the production of box shook?

Mr. Whittaker: Now just to keep the record

(Testimony of Rollin P. Rodolph.)

straight, I would even like to have the question answered myself, but it is not competent and I must object to it for the reason that it is asking for the governmental process.

The Court: Yes, I think that is good.

Mr. Levitt: Well, I think it is in evidence already, your Honor, and I can assure your Honor that I have a very definite purpose in tying this in with the issue.

The Court: Mr. Momyer has already testified to that.

Mr. Levit: Yes, he has, your Honor, that's right.

Q. Do you recall when it was that the raise in shook prices came about about 1942?

Mr. Whittaker: Are you talking about O.P.A. prices, Mr. Levit?

Mr. Levit: O.P.A. prices, yes.

A. First of all, the shook prices were relatively low, and along in October or November of 1943, the O.P.A. added table 3A to the price list, which in itself raised the shook prices quite considerably.

Q. Yes. And during the period of time during 1942 and 1944, did the O.P.A. ceiling prices of box lumber go up or down?

A. They went up.

Q. How much?

A. About \$3.00 per thousand feet. [150]

Q. In other words, very little in comparison with the raise in ceiling prices of shook?

(Testimony of Rollin P. Rodolph.)

A. That's correct.

Q. Now you are familiar, I take it, with the practices of accounting in the lumber industry, are you not?

A. Yes.

Q. In a remanufacture operation, in the lumber industry, is it or is it not the general practice to transfer lumber to the remanufacture operation at market prices?

Mr. Whittaker: Just a moment. If the Court please, I object to the question for the reason it is outside the issues in this case, it does not say what is meant by "market price" and that therefore it is immaterial and irrelevant to any issue before the Court in the form stated.

Mr. Levit: I think counsel's objection is well taken with respect to the term "market price."

The Court: Yes.

Q. (By Mr. Levit): Referring to the period before 1942 up to 1942, and so that we don't have any question of O.P.A. prices entering into it, and let us say also to the period since O.P.A. prices went out, what was the general practice of the industry, the lumber industry, with regard to the basis upon which lumber was costed into remanufacture operation such as a box factory?

A. In the great majority of cases, a raw material which is box [151] lumber or other remanufacturing product, was costed into the operation at the market value.

Q. In your opinion, Mr. Rodolph, is that a

(Testimony of Rollin P. Rodolph.)

proper accounting practice and in accord with sound accounting principles?

Mr. Whittaker: If the Court please, I object to the question as calling for an opinion upon a matter of law.

The Court: Well, I will overrule the objection; I think it calls for an opinion on the matter of accountancy.

Mr. Whittaker: Well, of course——

The Court: In other words, I am confronted with this: here the parties agree to appoint appraisers to determine what the loss of profits were. Well, certainly in determining what the loss of profits are, it is implicit that they must adopt some theory of accountancy. It may be that they have to also resolve theories of law, but they certainly have to resolve theories of accountancy. In other words, the appraisalship, it seems to me, would be absolutely worthless and needless if they are appointed to determine what the profits are, if they can't take into account some theory of accountancy.

What is the question there?

(Record read.)

A. Yes.

Q. (By Mr. Levit): Now, Mr. Rodolph, directing your attention to the lumber industry again and to the costing of box lumber into the remanufacture in the box factory, during the period [152] of the O.P.A., what was the practice, the general practice,

(Testimony of Rollin P. Rodolph.)

of the lumber industry with respect to the basis upon which that costing was done during that period?

Mr. Whittaker: I object to that question, if your Honor please, as calling for a conclusion, a practice, which may or may not have been consonant with the law.

The Court: Well, I will overrule it for the same reason.

A. The practice was to use the O.P.A. prices in most operations, the large majority of operations.

Q. (By Mr. Levit): You mean in the case of most operators? A. Yes.

Q. And that was true, was it, whether or not the particular operator operated only a box factory or an integrated operation? A. Yes.

Q. Now in your opinion, Mr. Rodolph, was that practice in accord with sound accounting principles and practices?

Mr. Whittaker: Just a moment. If the Court please, I object to that question as calling for a conclusion, irrelevant and incompetent, and invading the province of the Court on a matter of law.

The Court: I will allow it.

A. It was.

Q. (By Mr. Levit): Mr. Rodolph, in your opinion were the practices that you have testified to in your lumber industry with respect to the basis upon which lumber is costed into a [153] box factory operation provide a proper basis for the allocation

(Testimony of Rollin P. Rodolph.)

of profits as between the box factory operation on the one hand and the other operations of an integrated lumber plant on the other, pursuant to proper accounting principles and practices?

Mr. Whittaker: I object to the question for the reason that it calls for a conclusion, and even a legal conclusion; it is incompetent and immaterial to any issue here.

The Court: I will overrule it. It calls for the conclusion of an expert on accounting matters.

A. It was.

Q. (By Mr. Levit): Your answer is in the affirmative? A. Yes.

Q. In your opinion, Mr. Rodolph—I will withdraw that. The term “average cost” has been used in this case as meaning a cost of lumber at the diversion point—that is, after it goes through the sawmill—based upon the entire cost of production averaged over the number of feet produced. You understand that use of the term, Mr. Rodolph?

A. I do.

Q. In your opinion, would the use of “average cost” as a basis for costing lumber into a box factory operation in an integrated plant furnish a proper basis of allocation of the profit of the box factory operations as compared to the balance of the plant under proper accounting principles and practices? [154]

Mr. Whittaker: Just a moment, I object to the question for the reason that it calls for a conclusion

(Testimony of Rollin P. Rodolph.)

and a legal conclusion, and invades the province of the Court and is wholly immaterial.

The Court: I will overrule it.

A. It would not.

Q. (By Mr. Levit): Now, Mr. Rodolph, the principle of cost allocation is well recognized in the practice of cost accountancy, is it not?

A. It is.

Q. And as a matter of fact, is it or is it not in common use in the lumber industry? A. Yes.

Q. Now in referring to a joint products, principles of cost accounting in connection with joint products, and by "joint products" I mean products of varying kinds or grades that come as the result of a single process of manufacture—I refer specifically, for example, to lumber at the diversion point after it goes through the sawmill. Now in determining the allocation of cost, in using the principles of cost allocation in relation to the lumber business, or in relation to any cost allocation problem of a series of joint products, is it or is it not true that the number of grades or divisions into which the product, the end-product, is divided for purposes of cost allocation is a matter of accounting and management judgment? [155]

Mr. Whittaker: Just a moment. If the Court please, I object to the question as calling for a conclusion, not proper because it is a matter that is subject to opinion evidence, and therefore calls for

(Testimony of Rollin P. Rodolph.)

a conclusion, and it is immaterial here and is outside the issues.

The Court: I will overrule the objection.

A. It is.

Q. (By Mr. Levit): And in the lumber industry, in connection with the matter of cost allocation to grades of lumber, in general how many grades are used for cost allocation purposes?

Mr. Whittaker: If the Court please, I object to that question for what is general isn't an issue in this lawsuit.

The Court: I will overrule it.

A. It varies with the operation. You will find allocations into three or four classifications. You will find others in ten or twenty, and sometimes you will find someone that goes to a large group of allocations. Generally in the industry in which Pickering Lumber Company is associated—that is, the Pine and Associated Woods—the allocation doesn't exceed over twenty to thirty classifications.

Mr. Levit: That is all.

Cross-Examination

By Mr. Whittaker:

Q. Mr. Rodolph, may I ask you a few questions, please? A. Certainly. [156]

Q. You formerly did the accounting work for Pickering, did you not? A. Yes.

Q. You made its audits, did you not?

A. They were done under my direction.

(Testimony of Rollin P. Rodolph.)

Q. Did you there set up any allocations, any allocated costs for lumber? A. No.

Q. Never at all, did you? A. No.

Q. Now you know that the Pickering operation is an integrated operation, don't you, Mr. Rodolph?

A. Yes.

Q. Do you know, too, that this action is one upon use and occupancy insurance policies?

A. Yes.

Q. Is it your understanding that those policies insured the profits of the box factory, logging, milling, planing, separately?

A. I do not know that.

Mr. Levit: Just a moment. Pardon me. I object to the question on the ground that it is not proper cross-examination, has no relation to any of the things that this witness has testified to.

The Court: Well, it may be preliminary. [157]

Mr. Levit: Well, it might be. The witness answered it anyway. He said he doesn't know one way or the other.

The Witness: May I explain my answer? I haven't seen the policies, and all I know about the case is what I have learned in the back of the room here.

Q. (By Mr. Whittaker): Now, Mr. Rodolph, if we are interested in the determination of profits, that means actual profits, and we have non-realizations, is it necessary then to indulge in a fictional

(Testimony of Rollin P. Rodolph.)

theory or do you know of the figures that present the actual facts?

A. Well, in accounting we very seldom have actual sales and production determined at the time when we make our accounting period. After all, accountancy breaks things off.

Q. That's right.

A. Now then, in determining profits, it is necessary to make certain estimations, always.

Q. When you haven't sold it?

A. When you haven't sold the complete product.

Q. Yes.

A. Now if you started and ended, the accountancy is simple.

Q. Now then, Mr. Rodolph, in determining the question of allocated cost, you have to have known results or theorize them, do you not?

A. Allocation is an estimate always.

Q. Yes. Now to be specific as to what I mean about this, you [158] must either know what are the sales prices actually received, or you must indulge a theoretical sale at market?

A. No, you may determine to the best of your ability but the value—not of the sale, but of the several products—are, and allocate on that value.

Q. All right. Then you have to assume that value?

A. That's correct.

Q. All right. Now that is, to assume that those goods, if sold at that junction or at that time would have produced so much money?

(Testimony of Rollin P. Rodolph.)

A. That might be one of the factors in determining value.

Q. Yes. Now, during a time when O.P.A. maximum ceiling prices were in effect, you couldn't use in determining such a fictional value, more than O.P.A. ceiling prices, could you?

A. Well, I don't know whether it is fictional or not, but you used O.P.A. ceiling prices.

Q. Could you use any more?

A. I don't think so.

Q. Why not?

A. Well, you couldn't sell it for any more, in the first place. Let me explain my answer.

Q. Yes.

A. In the first place, you couldn't sell it for any more, and if you kept on—then too, it would deteriorate. Lumber deteriorates. I don't consider, in my mind, that the value was [159] more than the O.P.A. ceiling price.

Q. Now, Mr. Rodolph, the reason you couldn't sell it for any more at that time was that it would be a crime to do so under the Office of Price Administration regulations, M.R.P. 540, wouldn't it?

A. Well, I don't know. That is a conclusion of law that I don't know whether I can pass on or not.

Q. All right. Of course you know that in the Court—I don't know this of my own knowledge, but I know generally and assume it happened here—there were people prosecuted criminally for the violation of O.P.A. ceiling prices. That is, attempting

(Testimony of Rollin P. Rodolph.)

to sell a product that was under ceiling prices for more than the ceiling prices. You couldn't do it, could you? It was a crime, wasn't it?

A. I think so.

Q. Are you familiar with the fact that O.P.A. ceiling prices dealt solely with the subject of the sale or purchase of covered commodities?

The Court: Of what?

Mr. Whittaker: Of those covered commodities?

A. I think so.

Q. Yes. Do you know the definition of the term "sale" as used in the O.P.A. maximum price regulation?

A. I don't think I do. It is a legal question, and I haven't researched it. [160]

Q. Do you know that it is there recited that O.P.A. prices shall not—the term "sale" shall not be construed—why do I theorize on it?

Mr. Levit: I think it would be better to refer to the regulations. May I see it?

(Regulation examined by counsel.)

Mr. Levit: That has nothing to do with lumber. This dealt with second hand automobile sales.

Q. (By Mr. Whittaker): Going on with my question, that the regulations provide, paragraph c of M.R.P. (that is, "Maximum price regulation")—540;

"Sale includes sales, dispositions, exchanges and other transfers and contracts and offers to do any of the foregoing. It includes conditional sales and

(Testimony of Rollin P. Rodolph.)

sales under rental contracts, lease agreements or other agreements. It also includes transfers by banks, finance companies or other persons discounting promissory notes, following taking of possession by such persons upon default of the person making such promissory notes. The term 'sale' does not refer to a judgment of losses made in connection with settlements of claims under policies of insurance against fire, theft, collision, other loss of property or other coverage, even though the right of subrogation may be involved. The terms 'sale, seller, selling, purchase, purchaser, and purchasing' shall be construed [161] accordingly."

Did you know that that definition of the term "sale" is included in the act?

Mr. Levit: Just a moment. If the Court please, counsel was reading from a price regulation that deals solely with second hand automobiles.

Mr. Whittaker: All right.

Mr. Levit: It has nothing to do with any of the things that this witness has testified to, it has nothing to do with lumber, and I think counsel knows very well that no such provision is found in the maximum price regulation dealing with lumber or any of its products.

The Court: Is that true?

Mr. Whittaker: No, this is the general maximum price regulation, 540, your Honor, the general maximum price regulation.

The Court: Well, I think I will let him answer

(Testimony of Rollin P. Rodolph.)

the question, if it is a general one. You asked him if he knew that?

Q. (By Mr. Whittaker): Yes. Do you know that definition?

A. Wait a moment. I think I would like to have that question read.

The Court: Well, the real gist of that question is, did you know that the term of "sale," as defined in that price regulation, excluded from the word "sale" fire adjustment losses? Did you know that?

The Witness: No, I did not.

The Court: That is the answer.

Mr. Levit: Now it will be stipulated, counsel, that that is an M.P.R.—what is it, 540?

Mr. Whittaker: 540.

Mr. Levit: 540.

Q. (By Mr. Whittaker): Mr. Rodolph, it is common, isn't it, for all businesses to set up for informational purposes a system of allocations so that they may know when to end a certain manufacturing process, when it ceases to be profitable? That's right, isn't it?

A. Either that or to make studies of such matters.

Q. That is what I mean. And that is the reason for the indulgence by accountants of an arbitrary value at times prior to actual sale of the products, isn't it?

A. I don't think that is the purpose. They may use arbitrary values in determining whether they

(Testimony of Rollin P. Rodolph.)

plan to continue or not, but the decision usually in business of whether an operation is to continue or cease is one of profit—whether it is more profitable to continue or to cease the operation.

Q. That's right, in the course of manufacturing. Now another purpose is for income tax purposes, isn't it?

Mr. Levit: Another purpose of what, counsel?

Q. (By Mr. Whittaker): Another purpose of using the allocations, as you step along? [163]

A. You mean, you may allocate cost for determining inventories for income tax purposes? Yes.

Q. That is what I meant. You expressed it much better than I did. Now when you get all through, though, the practical business operator wants to know how much the lumber, for example, actually cost him. He takes into consideration what were his out-of-pocket dollar costs, doesn't he?

A. Yes.

Q. And then he compares that with his actual realization to find out what he actually got out in dollars out of the business, doesn't he?

A. Yes.

Q. Now on this theory, Mr. Rodolph, of allocated costs, am I not right when I say that you first have to know what are the real or assumed realizations from the goods before you have a premise or basis from which to figure backwards in allocating the receipts to overall costs?

A. That is one of the factors. As I said before,

(Testimony of Rollin P. Rodolph.)

you determine value when you allocate. Now one of the factors is what you may get out of it in the future.

Q. That is getting right to what I am trying to say. You have said it again much better than I do. How do you determine that value when you haven't sold it?

A. Well, in determining values, many factors are taken into consideration. For example, I had an income tax case, and I [164] listed some thirty different factors we used in determining values. When you come to go into values, you use your judgment on all the information you have.

Q. You have to do it, because you don't have actual conditions at that time with which to deal, don't you?

A. Well, you have certain actual conditions.

Q. I shouldn't have said "actual conditions." Yes, you are right. You don't have any known recovery, is what I meant; that's right, isn't it?

A. It is an estimated recovery.

Q. Yes. Now you may actually sell the goods for far less or for far more, is that right?

A. Yes.

Mr. Whittaker: Excuse me just a second, your Honor.

Q. And of course if you have the known recovery, you don't have to indulge any estimates, do you?

A. No. You have a computation, probably, to

(Testimony of Rollin P. Rodolph.)

make, and a known recovery would be a very influencing factor on the value that you used.

Q. You worked with Frank Momyer, didn't you, when you were doing auditing work for Pickering? Or did you not? A. I did not.

Q. Now of course we had very abnormal conditions in the lumbering industry, and particularly in the box shook end of it, during O.P.A. prices and the duration of the war, didn't we? [165]

A. Yes.

Q. And there was a great demand on the part of the government for boxes, was that not true?

A. Yes.

Q. And you know, of course, that Pickering manufactured its own lumber for the supply of its box factory?

A. I suppose so. I don't know of my own knowledge.

Q. Oh, didn't you? Well, didn't they do that when you were accountant?

A. Well, that wasn't during the period of 1945.

Q. No, but they made boxes before that?

Mr. Levit: Well, you addressed your question, counsel, to the O.P.A. period.

Mr. Whittaker: Did I?

Mr. Levit: You started out to talk about the abnormal conditions that existed in the O.P.A. period.

Mr. Whittaker: Well, I mean, I started out—well, let's keep it straight.

(Testimony of Rollin P. Rodolph.)

Q. Now there were great scrambles during the period of the later years of the war, especially existing in 1945, for people trying to get lumber to make boxes or box shook, wasn't there?

A. For all lumber, yes.

Q. Now it has been stipulated—I mean, it is admitted by the pleadings here—that you couldn't buy any box lumber or [166] lumber suitable for the manufacture of box shook at O.P.A. prices in 1945 and following, through July 7. You know that is the situation, or was, don't you?

A. No, I don't. I could say that we have records of certain amounts of lumber passing at the O.P.A. ceiling as box lumber. Not very much, but there were sales and we have operators that sold maybe 8 or 10 per cent of their production as box lumber.

Q. Now was that prior to or after July 7, 1945, if you know?

A. Both periods.

Q. Now there may have been a case once in a while, wasn't there, wherein some small operator who was a manufacturer but did not have a box factory might have sold some occasionally in small amounts?

A. That's correct.

Q. That is what you mean?

A. No, I have seen larger operators sell a certain portion of their production as box lumber.

The Court: At O.P.A. prices?

The Witness: At O.P.A. prices, yes, sir.

Mr. Whittaker: I believe that is all. Thank you, sir.

Mr. Levit: No further questions. .

(Witness excused.)

Mr. Levit: The plaintiff rests, if the Court please.

[Endorsed]: Filed September 7, 1949. [167]

Friday, June 10, 1949

(After plaintiff rested, the following occurred:)

Mr. Levit: Now, the question arises as to the wishes of Court and counsel with regard to the matter of argument. Also I may recall to Your Honor's attention that the depositions that are in evidence have not been read.

The Court: I haven't read them.

Mr. Levit: No. I know that counsel has some ideas about leaving town. I realize he is from out of town and I would rather hear his suggestions as to what to do. As far as I am concerned, we are prepared to argue the case now. We are prepared to file briefs, or we would be prepared to argue it later or to do both. It is immaterial to me, except that I do want to make oral argument. I do want to have an opportunity for oral argument.

Mr. Whittaker: Your Honor, I do not want the fact that I am from out of town in any way to interrupt the normal functions of the court; and the fact that I am from out of the city may be entirely forgotten here.

Now, I have requested findings of fact and conclusions of law which I desire to submit to the Court. I would like to pass them up now. I also have a rather short brief on the merits.

The Court: You mean covering points not covered by the printed brief that you have already filed?

Mr. Whittaker: Yes, Your Honor, picking up where the [169] printed brief ends. That is a brief, as we call it, upon the law of appraisals, and then it picks up from there to set forth the issues, the facts and the figures in tabular form, and the law applicable to all the points involved on this hearing.

Now, there is one matter in the brief that I have a number of cases on and didn't put it in the brief, and therefore I would like to rewrite it and send it to Your Honor, to put in those several cases that really are a part of the subdivision on the box factory.

Now, so far as argument is concerned, if it is convenient and agreeable to Court and counsel, I would like for us to argue it today, inasmuch as Mr. Levit wants to orally argue it. I would just as soon submit it on briefs.

The Court: Well, as long as he wants to orally argue it, I think we had better go ahead with the argument and then you can go into briefs later.

Mr. Levit: Well, the only thought I had is this, Your Honor: While the trial of this case has been rather short, actually the principles of law involved are somewhat involved, as of course is apparent from the printed brief that counsel filed. And as

may be apparent from the fact that just the briefing of the cases alone that are cited here, with a few others, took this entire book (indicating). Now, in addition to that, as Your Honor realizes, the factual questions are by no means simple. There are accounting problems involved, and so forth. [170] I would say that I would like to have from one to two hours to present my side of the case. Now, I suppose—it is immaterial to me whether I open or close or who opens or closes, but I presume that the best way to do would be to let counsel go ahead, because he has the burden of setting aside the award. Then we will reply and then he can close.

The Court: Either way you want.

Mr. Levit: Well, it doesn't matter.

Mr. Whittaker: Either way is agreeable to me.

Mr. Levit: I don't care, but I imagine that would be the proper way to do it.

Mr. Whittaker: Either way is agreeable to me.

The Court: Well, I think the burden is upon you to set aside the award. Maybe you had better open and then close later.

Mr. Whittaker: Very well.

The Court: You can take as much time as you want. We can stay here this afternoon and come back Monday afternoon, if necessary.

Mr. Levit: Thank you, Your Honor.

The Court: I will take a recess now for about five minutes.

(Recess.) [171]

Monday, June 13, 1949

Mr. Whittaker: If the Court please, I would like now to hand up our brief on the merits, and one to counsel for the plaintiffs (handing to Court through the Clerk and handing to counsel). Knowing that Your Honor has a conference of the Judges at 4:00 o'clock, we don't care to make any further argument.

The Court: Very well. Do you wish to reply to this brief?

Mr. Levit: Yes, Your Honor. As a matter of fact, I have two briefs to reply to. I have the lengthy brief on the law, which I think requires a reply, and also this, which of course I haven't seen.

The Court: How much time do you want?

Mr. Levit: Oh, I would suggest——

The Court: You can combine both replies in one brief. [76]

Mr. Levit: Oh, yes, I intended to do that. I will be away for about ten days during the next two weeks, so I would like to have twenty to thirty days, Your Honor.

The Court: You couldn't make it a little sooner than that?

Mr. Levit: Suppose we say twenty, and I will try and get it in sooner. I would like to get it closed up.

The Court: As you know, I have only been on the bench for about a month or two, and I like to decide these things when they are hot with me, not when they are cold.

Mr. Levit: Very well, Your Honor.

Mr. Whittaker: The case has been pending for quite a long time, Your Honor, and we would very much appreciate as early a decision as is consistent with reason.

Mr. Levit: I have to leave town at the end of next week, the end of this week I should say. If I can get it done before then, I will. But this case has forced me to put off so many other things that I may not be able to do it by then.

The Court: Well, suppose the end of next week. That will be 14 days, won't it?

Mr. Levit: Yes. But I will be away all that week. I am going to Seattle.

The Court: Let's say three weeks, then, and you can have another week to reply. Will that be enough for you? Maybe not.

Mr. Whittaker: Would Your Honor make it ten days because it would take a little time in the mail perhaps? [77]

The Court: I am not going to hold you hard and fast to those time limits, I am just suggesting this thing to you so that you won't forget these facts.

Mr. Whittaker: Yes.

The Court: I make copious notes and all that, but I don't know how anybody else in a judicial position acts—however, that is the way I am trying to do it. And I remember that in the practice of the law, I would forget a client's case after I tried it, in about ten days. But I wouldn't hold you to those terms. However, let's try to meet them anyway.

Mr. Levit: Yes, Your Honor.

The Court: The matter will be marked submitted when the briefs come in?

Mr. Levit: Very well.

Mr. Whittaker: May I say before Your Honor adjourns, I wish to express my appreciation both to the Court and counsel for the courtesies that we have enjoyed in the trial of this lawsuit, and my pleasure in being permitted to participate in this trial.

The Court: We appreciate your fairness and courtesy, too, Mr. Whittaker. I hope you have a fine trip home.

The Clerk: The case is continued until July 18 for submission.

[Endorsed]: Filed September 7, 1949. [78]

In the District Court of the United States for
the Northern District of California, Southern
Division

No. 27,299-H

THE AMERICAN INSURANCE COMPANY, et
al., all corporations,

Plaintiffs,

vs.

PICKERING LUMBER CORPORATION, a cor-
poration,

Defendant.

DEPOSITION OF ANSON HERRICK

Be It Remembered, that on Thursday, the 28th
day of August, 1947, at 9:30 o'clock a.m., pursuant

to Notice of Taking Deposition, at the offices of Messrs. Severson, Brown, Keough & McCallum, 605 Market Street, Room 1004, San Francisco, California, personally appeared before me, Louis Wiener, a Notary Public in and for the City and County of San Francisco, State of California,

ANSON HERRICK

a witness called on behalf of the defendant herein.

Messrs. Long & Levit, represented by Bert W. Levit, Esquire, and David C. Bogert, Esquire, appeared as attorneys for the plaintiffs; and Messrs. Severson, Brown, Keough & McCallum, represented by Harold Clinton Brown, Esquire, appeared as attorneys for the defendant. [1*]

The said witness having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the above-entitled cause, did thereupon depose and say as hereinafer set forth.

(The notary public administered the statutory oath to Anson Herrick.)

The Notary Public: And all of the usual stipulations, gentlemen? I may be excused?

Mr. Brown: Mr. Wiener, I think you had better stay here for just a little while. I think they are contemplating an objection at the outset, and if so you had better remain.

(Mr. Lewis Lilly enters deposition room.)

* Page numbering appearing at top of page of original Reporter's Transcript.

Mr. Brown: Mr. Lilly, you might be sworn at this time, and then you will be excused.

The Notary Public: May I have your name?

Mr. Lilly: Lewis Lilly.

The Notary Public: And your address?

Mr. Lilly: 444 California Street.

(The notary public administered the statutory oath to Lewis Lilly.)

Mr. Brown: Now you may be excused until further notice, Mr. Lilly. [2]

ANSON HERRICK

a witness called on behalf of the defendant, being first duly cautioned and sworn by the notary public to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Examination

By Mr. Brown:

Q. What is your full name, please?

A. Anson Herrick.

Q. What is your address?

A. 465 California Street.

Q. With what firm or firms are you associated, and in what business are you engaged, or what profession?

A. I am in the profession of public accountancy, senior partner of the firm of Lester, Herrick and Herrick.

Q. How long have you been so engaged in that profession or business?

(Deposition of Anson Herrick.)

A. Must I answer that? Too long. Forty years.

Q. Now, you were one of the appraisers in the claim of the Pickering Lumber Corporation on its policies of insurance covering business interruption losses due to a fire that occurred at the Pickering Lumber Corporation's plant at Standard, California, on or about July 7th, 1945, which was the date of the fire, is that correct? A. I was.

Q. And you were appointed as such appraiser by the Pickering Lumber Corporation?

A. That is correct.

Q. And Mr. Frank J. Maloney was appointed as the other appraiser, is that correct?

A. That is right. [3]

Q. And between the two of you, and pursuant to the terms of the policies of insurance in this case, you selected an umpire, did you not?

A. That is right.

Q. And you selected whom?

A. Mr. Lewis Lilly.

Q. Before entering upon your duties as an appraiser in this case, you read the policy provisions relative to your appraisal duties, is that correct?

A. That is right.

Q. And other pertinent provisions of the policy?

A. That is right.

Q. You are familiar with this clause of the insurance policy—and I am reading from Exhibit "A," page 3 of the plaintiffs' complaint on file

(Deposition of Anson Herrick.)

herein, which is a portion of one of the insurance policies of one of the insurance companies in this case, which states as follows:

“If the insured and this company fail to agree, in whole or in part, as to the amount of loss, within ten days after such notification, this company shall forthwith demand in writing an appraisement of the loss or part of loss as to which there is a disagreement, and shall name a competent and disinterested appraiser, and the insured, within five days after receipt of such demand and name, shall appoint a competent and disinterested appraiser, and notify the company thereof in writing, and the two so chosen shall, before commencing the appraisement, select a competent and disinterested umpire.

“The appraisers together shall estimate and appraise [4] the loss or part of loss as to which there is a disagreement, stating separately the sound value and damage, and if they fail to agree they shall submit their differences to the umpire, and the award in writing duly verified of any two shall determine the amount or amounts of such loss.”

You were familiar with that clause in the policy?

A. I was.

Q. And you were at the time of this appraisement and after your appointment, is that correct?

A. That is correct.

Q. Have you the date of the first hearing that you held?

(Deposition of Anson Herrick.)

A. March 26th, 1947, commencing at 10:00 o'clock in the morning.

Q. And who was present at that hearing?

A. Myself, Mr. Maloney and Mr. Lilly, as appraisers and umpire; Mr. Frank Momyer, secretary and treasurer of the Pickering Lumber Corporation; Ben Johnson, chairman of the board of directors of the Pickering Lumber Corporation; Paul Barnett, of the firm of Watson, Ess, Barnett, Whitaker & Marshall, 15th floor Dierks Building, Kansas City 6, Missouri, attorney for the Pickering Lumber Corporation; George Herrington, associated attorney with Paul Barnett; W. H. Thomas, of the firm of Thomas & Jackson, Portland, Oregon, a forest engineer; Walter S. Kennon, Standard, California, sales manager Pickering Lumber Corporation; J. C. Lucas, certified public accountant, with the firm of Robinson, Nowell & Company, independent accountants for the Pickering Lumber Corporation; [5] Kenneth W. Withers and Wilfred N. Ball, representing Fire Companies' Adjustment Bureau, Inc., 315 Montgomery Street; Frank Baker, public accountant, engaged by the insurers; Curt F. Setzer, witness for Pickering Lumber Corporation; he is a box factory operator; Mr. Lee Moffett, witness for Pickering Lumber Corporation; he is connected with the Western Pine Association.

Q. How many hearings did you have on this matter?

A. The hearing on March 26th adjourned at

(Deposition of Anson Herrick.)

noon, reconvened at 2:00 o'clock, and continued until approximately 4:00 o'clock; reconvened at 9:00 a.m. on March 27th, continued until noon, reconvened at 2:00 o'clock or thereabouts, and continued until about 4:00 in the afternoon.

Q. Now, at the outset of this deposition, besides reading the provisions of the insurance policy, particularly the clause that I mentioned to you, a Mr. Withers you mentioned was present—is that correct?

A. That is correct. By the way, you said at the beginning of this deposition. I think you meant at the beginning of this hearing.

Mr. Brown: That is correct. Will you make that correction, Mr. Reporter.

Mr. Levit: Will you read that back to me, Mr. Hart?

(Record read.)

Q. (By Mr. Brown): Now, Mr. Withers at that time gave some further instructions to the effect that you need not necessarily [6] confine yourself to the information obtained at this hearing, but you could also inform yourselves in any legitimate manner and from any legitimate source that you saw fit, is that correct?

Mr. Levit: Just a minute, Mr. Herrick. I object to the question on the ground it is leading and suggestive.

Mr. Brown: You may answer the question.

(Deposition of Anson Herrick.)

A. I recall no such statement by him at the hearing.

Q. Were there any additional instructions given you at the outset of that hearing, or at any time during the hearing, relative to your duties as such appraisers?

Mr. Levit: By whom?

Q. (By Mr. Brown): By any of the representatives of either the Pickering Lumber Corporation or by the representatives of the insurance companies? A. None.

Q. None?

A. I might interject that I had a letter from Mr. Withers, and I believe copies of that were furnished to the others involved.

Q. Could we have the date of that letter, if you have it in your files that you are looking through?

A. I am trying to find it. Just a minute. It is a letter dated April 4th, 1947, to the appraisers, filed by Kenneth W. Withers on behalf of the insurers. That letter, by the way, was referred to in the award.

Q. It was referred to in the award by the appraisers? A. Yes. [7]

Q. Does it indicate in your files, or that copy of the letter that you have in your files, that copies were furnished to the Pickering Lumber Corporation and to the plaintiff insurance companies?

A. No, but the letter that I received was a carbon copy. It was addressed to Mr. Maloney and to me.

(Deposition of Anson Herrick.)

Q. Have you an extra copy of that letter in your files? A. No.

Q. May we have that letter, please, so we may have it marked in evidence as an exhibit?

A. Well, I dislike very much taking it out of my file. I will be very happy to have a copy made for you.

Mr. Brown: That will be satisfactory. If you will have a copy made, and furnish it to Mr. Hart so he may include it as an exhibit in this deposition, if that is satisfactory to you, Mr. Levit.

Mr. Levit: Yes, it is.

Mr. Brown: I will ask that be marked as "Defendant's Exhibit No. 1."

Mr. Levit: Of course, it will be understood that by failing to object to the attachment of the letter to the deposition we do not concede its materiality or relevancy. As a matter of fact, I haven't yet seen the letter, but we have no objection to it being attached to the deposition if it was furnished to the appraisers in the appraisal as Mr. Herrick testified. [8]

The Witness: What exhibit will that be?

Mr. Brown: "Defendant's Exhibit No. 1."

(Said letter marked "Defendant's Exhibit No. 1.")

Q. (By Mr. Brown): Now, in arriving at your findings of fact and your award you did not confine yourself to the testimony produced at that hearing, did you? A. No.

(Deposition of Anson Herrick.)

Q. You did not swear any witnesses at the hearing, did you? A. No.

Q. And you didn't serve any subpoenas—
A. No.

Q. (Continuing): —on witnesses to appear?
A. No.

Q. Did you have any books of the Pickering Lumber Corporation in your hands at the time of this hearing? A. No.

Q. Did you at any time examine those books?
A. No.

Q. You did have the document entitled "Final Proofs of Loss of the Pickering Lumber Corporation," did you not?

A. That is correct. In addition to which the appraisers obtained copies of the annual reports prepared by their independent accountants for several years.

Q. And those were at the hearing and before yourself and the other appraisers at the time of the hearing, is that correct?

A. No, they were obtained after the hearing.

Q. They were obtained after the hearing?

A. Yes.

Q. And you examined those documents in arriving at your award?

A. They were examined to the extent that we considered the information pertinent.

Q. Yes. And the pertinent information therein,

(Deposition of Anson Herrick.)

you used [9] the information in analyzing the claim and finally arriving at your award?

A. To a limited extent. The extent was limited because of the detail of the matter of the claim which had been presented.

Mr. Brown: Yes.

Mr. Levit: I didn't hear that last, Mr. Reporter. Will you read it?

(Record read.)

The Witness: Well, it should be, the detail with which the claim had been presented.

Q. (By Mr. Brown): Now, you did arrive at an award, did you not—finding and award?

A. We did.

Q. And those findings and award were dated May 1st, 1947? A. Yes.

Q. I will show you what purports to be a copy of those findings and award, and ask you if the one I am showing you is a correct copy of that?

A. Well, without checking it word for word, I would say that it was.

Q. It appears to be a carbon copy.

A. No, it isn't a carbon copy. It is a carbon copy of a retyping of the original award.

Mr. Brown: Subject to that being checked, rather than doing it now, supposing we stipulate that it is a correct copy. It is the one that was forwarded to us by the company.

Mr. Levit: Well, I wouldn't have any way of knowing. As a matter of fact, I don't think that

(Deposition of Anson Herrick.)

for the purpose of the [10] deposition there is any need of attaching a copy of that kind to the deposition because there are photostatic copies of the award itself available, and I am sure you either have them or I can furnish them to you, or your client can furnish them to you, and we can produce them at the time of the trial.

Mr. Brown: I will withdraw the statement.

Q. In your award and findings as set forth in that award of May 1st, 1947, and as signed by yourself, Mr. Maloney and Mr. Lilly, you arrived at certain sums as set forth there—total sums—is that correct? A. That is correct.

Q. Now, did you prepare any memorandum of the detail making up those sums? A. Yes.

Mr. Levit: Well, I object to the question on the ground that it is entirely irrelevant and immaterial; pertinent to no issue in the case as to what memorandum Mr. Herrick or any other appraisers or any umpire prepared preliminarily to making up the award.

Mr. Brown: What is your answer?

A. Yes.

Mr. Levit: May I request, Mr. Brown, that you clarify the question to the extent of determining whether the “you” to which you refer in the question refers to Mr. Herrick or refers to the appraisers and umpire as a group?

Mr. Brown: I will.

Q. When I refer to “you” in these proceedings,

(Deposition of Anson Herrick.)

I am referring to yourself and the other appraiser.

Mr. Levit: Acting jointly?

Mr. Brown: Acting jointly. And to make the question clear, I will reframe it and ask you if you and Mr. Maloney prepared any detail in arriving at the final sum totals of your award.

Mr. Levit: Just a moment. I object to the question as unintelligible and contradictory. At the outset, Mr. Brown, you said you were referring to the two appraisers and the umpire, and then in the latter part of your question you said you were referring to only the two appraisers; furthermore, the question is unintelligible because it isn't clear from the question as to whether you mean each of them did prepare such memorandum, so that the answer "Yes" would mean that they all did it, but each of them did it on his own, or whether you mean any such document as you refer to, or memorandum, was prepared by them jointly as a board.

Mr. Brown: Let me ask you, Mr. Herrick, is the question clear to you, or is it not?

The Witness: It is a question that could either be answered "Yes" or "No."

Mr. Brown: Let me put it this way, then:

Q. Did you jointly as a board prepare any memorandum making up the detail of these final totals that you have submitted in your award of May 1st, 1947?

Mr. Levit: To which we object on the ground that it is irrelevant and immaterial; also on the

(Deposition of Anson Herrick.)

ground it is unintelligible, [12] because it says, as I recall the question—pardon me. Will you read the question again, Mr. Hart. I was a little confused by the form of it.

(Pending question read.)

Mr. Levit: I will confine my objection, then, to the point that it is irrelevant and immaterial.

Mr. Brown: Will you answer the question?

A. At the conclusion of the consideration by the appraisers and the umpire various bases were determined upon as acceptable, and upon the bases of those determinations I individually prepared a statement computing the loss, and that statement was considered by Mr. Maloney and Mr. Lilly, and became a statement which I think it is fair to say was the joint statement of the appraisers and the umpire.

Q. Have you that statement with you?

A. Yes.

Mr. Brown: May we have it, please, and to be marked as defendant's exhibit next in order.

A. Well——

Mr. Levit: Before making my objection to the production and the introduction of this statement, I would like, if you will permit me, Mr. Brown, to ask the witness a few questions concerning it.

Mr. Brown: Certainly.

Q. (By Mr. Levit): Mr. Herrick, you said that various bases were determined upon as acceptable.

(Deposition of Anson Herrick.)

By the word "acceptable" I take it you mean acceptable to the appraisers and the umpire? [13]

A. Of course.

Q. Would it be fair to say what you meant by "acceptable" was proper so far as your determination was concerned?

A. Proper; and I should have said accepted rather than acceptable.

Q. By the appraisers?

A. By the appraisers.

Q. And the umpire?

A. And the umpire, yes.

Q. I would like to ask you, Mr. Herrick, whether you ever furnished copies of that statement to anyone other than the other appraiser and the umpire?

A. I did not.

Mr. Levit: We now object to the production of this document on the ground that it is wholly incompetent, irrelevant and immaterial to any issue in the case; on the ground that it is a mere process in the determination by the appraisers of the award which they ultimately made, and therefore is incompetent as evidence, and has no bearing upon any of the issues of the case.

Q. (By Mr. Brown): Mr. Herrick, will you produce the document so that we might mark it in evidence as "Defendant's Exhibit No. 2"?

A. Again, I will say that I will give you a copy of that.

Q. Let me ask you this: The document as you

(Deposition of Anson Herrick.)

have it now is in the same form as when it was agreed on by the other appraiser, is that correct?

A. Yes.

Q. And the umpire? A. Certainly.

Q. In other words, there have been no changes of that form? [14]

A. Yes and no. The draft as originally typed had adopted a certain footage which was subsequently found to be in error, and the original typing was changed in pencil without being retyped.

Q. (By Mr. Levit): Was that change made before the final award was made?

A. Oh, certainly.

Q. (By Mr. Brown): There were no changes made on it before anything of that sort?

A. No.

Mr. Levit: I further object on the ground that this document is in no way binding upon the plaintiffs in this case. Now, at this time, Mr. Brown, I would like to state——

Mr. Brown: May I interrupt for just one second before you do that. I think this objection of yours will pertain to this next statement I am going to make.

In regard to that document, Mr. Herrick, I must insist that that one in particular be taken from your files, and incorporated here, and we will make a photostatic copy and give it back to you.

The Witness: Well, I will make the photostatic copy.

(Deposition of Anson Herrick.)

Mr. Brown: Then, Mr. Reporter, will you instruct the witness to produce the document and deliver it to us—I mean Mr. Notary.

The Notary Public: You will please——

Mr. Levit: Just a moment before you do that.

The Notary Public: Pardon me.

Mr. Levit: I would like to say, Mr. Brown, that we intend, [15] in the event that you propose to go into the mental processes and deliberations and memoranda of the appraisers that led up to the making of this award, we are going to ask, and we are going to demand, under the provisions of Rule 30d, that the taking of the deposition be suspended for a sufficient time to enable us to make a motion to the court for an order terminating or limiting the scope of this examination. In order not to be unduly technical, and not to cause us to go back and forth on the thing, I will make my objection a little fuller. I will say we have no objection whatever to the witness being asked and testifying as to any matters that have to do with the hearings which were held before the appraisers; I have no objection to the witness testifying as to what matters were considered by the appraisers; I have no objection to his producing, and to your attaching to the deposition, any documents that were furnished by either of the parties, or that the appraisers obtained on their own from outside sources and considered in the determination of this appraisal; but I will, as I say, in connection with this matter, that

(Deposition of Anson Herrick.)

in the event you propose to go into the deliberations of the appraisers themselves—the appraisers and the umpire themselves—or to ask them to produce, or to attach to the deposition, or to give you an examination of any memoranda which they made in the course of their deliberations for their own purposes as a part of their own process in arriving at this award, that we will not only object, but as I say, we will demand that the [16] deposition be suspended in order to enable us to take the matter before the court by motion under Rule 30d of the Federal Rules of Civil Procedure; therefore, I suggest that if you intend to inquire into those matters which are not within the scope of my objection that you pass this matter for the time, and complete those other matters; and then perhaps, if you wish, or not, just as you like, you can give us an opportunity to cross-examine on those matters, and then come to these other matters after that, so we won't have to do this in too much of a piecemeal manner.

Mr. Brown: Will you read the last question that I asked, Mr. Reporter?

Mr. Levit: Well, you asked the notary to instruct the witness to deliver to the reporter the particular memorandum to which he referred. And as I say, I would request that you postpone that demand until we complete the matters which both of us agree that you have a perfect right to inquire into on the deposition.

(Deposition of Anson Herrick.)

Mr. Brown: Well, Mr. Levit, I do not know what your specific objection is to this question. You have stated that you were going to object if I did certain things—if I contemplated doing certain things here. Now, you are objecting to the introduction of this particular document which, as I understand it, is a compilation of figures of the items in detail making up the final award—is that correct?

Mr. Levit: This particular document, as testified, was a [17] memorandum prepared by Mr. Herrick, which he submitted to the other two appraisers, showing the breakdown or detail upon which the final award was arrived at. He testified that it was subsequently changed by reason of an error in the computation that they found in it; that the other appraisers, after all of their deliberations were concluded, ultimately and before arriving at the award, agreed to it; and that no copies of it were ever furnished to anyone other than, as stated, to the other appraisers and to the umpire.

The Witness: May I interject?

Mr. Levit: Yes.

The Witness: I am not certain that I furnished copies of that to either Mr. Maloney or to Mr. Lilly.

Q. (By Mr. Brown): They did read it?

A. Oh, yes.

Q. And study it, and knew the items, and were in accord and in agreement with all of those items, is that correct? A. Completely so.

(Deposition of Anson Herrick.)

Mr. Brown: Well, Mr. Levit, I might say this: At this time I am going to request that the document be used as our exhibit, and marked as an exhibit, and that the notary instruct the witness to turn that document over to me so that it may be marked by the reporter.

Mr. Levit: If you insist upon it at this time, then——

Mr. Brown: I might say this, rather than to pursue that, I might ask a few further questions that might eliminate your motion that I feel you are in the act of making. [18]

Q. Would you read the items of that detail?

Mr. Levit: Well, I make the same objection, obviously, to the reading of the items; and would ask permission at this time also, now that the witness has testified further, to ask him another question or two concerning this document.

Q. Mr. Herrick, obviously, in order to arrive at the final award which was ultimately signed, it was necessary for the appraisers to come to conclusions on numerous details, was it not?

A. That is correct.

Q. And this particular document that you refer to was in the nature of a memorandum which you prepared after many of the deliberations had taken place, isn't that so?

A. That is correct; after all of the deliberations had taken place.

Q. Yes. And it was used by you and the other

(Deposition of Anson Herrick.)

appraisers merely as one of the steps in the process of making up your minds in arriving at the figures shown on the final award, is that correct?

A. That is correct.

Mr. Levit: As I say, Mr. Brown, if you insist upon the production and the attachment to the deposition of the document at this time, then I will make my demand for suspension of the deposition at this time, so that matter will be entirely in your control. If, on the other hand, you will pass this until you have completed the examination on those matters that we both agree are entirely relevant and material and proper to be inquired into, why, we can continue the deposition, and then [19] you can come to this again later.

Mr. Brown: Well, I will pass the question for the moment, and make the request later.

Q. I might ask relative to that memorandum, that is the only memorandum that was prepared, as I understand it?

A. That is correct.

Q. And that comprises the details and breakdown of the figures and the totals which were ultimately arrived at in your award, is that correct?

A. It is a summarization of certain figures—of all of the figures that entered into the computation, but it doesn't contain all of the detail making up many of those figures.

Mr. Levit: Will you read that answer back to me, Mr. Hart?

(Witness' answer read.)

(Deposition of Anson Herrick.)

Mr. Levit: Was that the last question you had directed to that particular document?

Mr. Brown: Yes.

Mr. Levit: Then I would like to ask a question at this point.

Q. You don't mean, Mr. Herrick, that during the entire course of this appraisal you did not prepare any other memoranda concerning the award or concerning the appraisal itself and the figures, do you?

A. I prepared many memoranda on various bases, but this is the only statement which was prepared after the appraisers and the umpire had reached a final agreement. [20]

Q. Yes. And you have no way of knowing how many or what memorandums during the course of your deliberations may have been prepared by the other appraisers or the umpire for their own use, have you?

A. I know that they made certain memoranda, but the extent to which they did I am uninformed.

Mr. Levit: Yes.

Q. (By Mr. Brown): And, Mr. Herrick, you have stated that various bases were determined upon in computing this loss and which were acceptable to the other appraiser and the umpire.

Mr. Levit: Well, now, I object to the question, Mr. Brown. I think you are mistaken there. I think the witness testified that various bases were con-

(Deposition of Anson Herrick.)

sidered. Instead of "considered," make that "determined upon."

Q. (By Mr. Brown): They were both considered and determined upon in arriving at this loss?

A. Many bases were considered; certain bases were finally accepted.

Q. On these bases that were finally considered, did you prepare any written memorandum pertaining to them?

Mr. Levit: Let the record show that we object on the same grounds, that it is entirely immaterial whether the appraisers or Mr. Herrick prepared any memorandum or memoranda whatever.

Mr. Brown: Will you answer the question?

Mr. Levit: The question is preliminary, so I won't insist at the moment on a suspension of the deposition, but I want to [21] reiterate our objection to it.

A. I prepared several memoranda as the considerations progressed. I doubt that any of those memoranda by themselves contained or summarized all of the considerations.

Q. (By Mr. Brown): Have you all of those written memoranda with you today?

A. Yes.

Q. How many are there?

Mr. Levit: The same objection.

Mr. Brown: This is off the record.

(Off record.)

(Deposition of Anson Herrick.)

Mr. Brown: What was the last question?

(Question read.)

Mr. Levit: And you have my objection, Mr. Reporter?

The Reporter: Yes.

Mr. Brown: We will pass that for a moment.

Q. Now, you are familiar with this document, as you have stated, entitled "Final Proofs of Loss of the Pickering Lumber Corporation," are you not?

A. I am.

Q. I show you schedule 1, page 2, of those Proofs of Loss, and point out particularly an item entitled "Production prevented, 39,816,770 feet at 6.68667; and after that figure there is the total sum of \$266,241.60. What figure did you arrive at for the production prevented?

Mr. Levit: Now, just a moment, Mr. Herrick.

The same objection goes to this question, and for the same reason. There is absolutely no occasion to inquire into the [22] figures that the appraisers used in finally arriving at their final conclusions; and I again repeat, Mr. Brown, that I am perfectly willing to continue the deposition if you can keep off for the moment the appraisers deliberations and the interim decisions that they arrived at prior to the making of the award. As I say, I don't have any objection——

Mr. Brown: Mr. Levit, just so that we understand ourselves here. You are objecting to the ques-

(Deposition of Anson Herrick.)

tioning of this witness on any item, or the amount of it, in arriving at the final award as set forth in this findings and award of the appraisers dated May 1st, 1946, is that correct?

Mr. Levit: Will you read that back to me, please?

(Record read.)

Mr. Levit: That is correct. You understand that I am not at all objecting to the appraisal, or to this witness testifying as to what items they took into consideration. I am objecting to any of the reasons that the appraisers had or arrived at for making these final figures unless those reasons go to a question that tends to show either a violation of the scope of the submission, or the matter of fraud. The process by which they arrived at the final award is wholly irrelevant to the question, and that is the basis of the objection. I think I stated it rather fully some time back.

Mr. Brown: I will ask the question. Will you read the first question I asked on this subject matter of this witness that was objected to, Mr. Reporter? [23]

(Pending question read.)

Mr. Levit: Now, I want to make the further objection to the question that the word "you" again is ambiguous. It is unclear whether it refers to the witness or whether it refers to the witness and the other appraiser, or whether it refers to the witness

(Deposition of Anson Herrick.)

and the other appraiser and the umpire acting jointly.

Mr. Brown: I will correct the question in that regard.

Q. What amount did you and the other appraiser and the umpire arrive at for "production prevented"——

Mr. Levit: Now, do I understand, Mr. Brown, that you intend——

Mr. Brown: Just one second. I want to finish that question.

Mr. Levit: Oh, pardon me.

Mr. Brown: (Continuing): ——for the loss period?

Mr. Levit: Do I understand, Mr. Brown, that you intend now to pursue the matters to which I have objected a good many times.

Mr. Brown: It is my intention to question this witness on the various items making up the total awards that are set forth in the award and other findings of the appraisers and umpire.

Mr. Levit: Now, bear in mind that I haven't the slightest objection to your asking the witness so far as the items that go to make up the total award are concerned, or what items they [24] took into consideration, or what evidence was produced before them on any of those items, or what evidence they obtained from other sources on any of those items, but that I do object, as I say, to the witness giving the process of items, or otherwise, or the

(Deposition of Anson Herrick.)

reasons for the particular amount that they arrived at.

Mr. Brown: You understand that I am not asking for any of the mental processes in making up this particular item. I am asking merely for the item itself.

Mr. Levit: I understand that, and my objection goes to that, but the award speaks for itself; and as to what the appraisers in dollars and cents included in making up their final figure, or what they didn't include, is wholly beyond the relevancy to any of the issues in this case; and I again repeat, if you do have questions that don't relate to this line of objection, we can get those out of the way; otherwise, as I say, if you insist upon an answer to this question, then before the witness answers the question I wish to demand a suspension of the deposition.

Mr. Brown: Let me reframe the question.

Q. In your award of May 1st, 1947, you have set forth in paragraph No. 1 the following language: "The net profits prevented and fixed charges and continuing expenses during the period July 8th, 1945, to April 7th, 1946, reduced by profits realized and fixed charges and continuing expenses by partial operation following the fire, amounted to \$581,000.00." [25]

That is an item in your award, is it not?

A. That is correct.

Q. Will you tell us the detail making up that

(Deposition of Anson Herrick.)

item, particularly, and first, what figure you and the other appraiser and the umpire arrived at in finding the net profits prevented?

Mr. Levit: To which I object on the grounds already fully stated; and at this time, Mr. Reporter and Mr. Notary, I demand that the taking of this deposition be suspended for a period which presumably Mr. Brown and I can agree upon; at any rate, for the time necessary to make a motion for an order under Rule 30d of the Federal Rules of Civil Procedure on the grounds already stated; and that the examination is being conducted in bad faith, and in such manner as to annoy, embarrass and oppress the plaintiffs in this case; and I am going to ask the court to limit the scope and manner of taking the deposition, or, in the alternative, to order that the notary cease forthwith from taking the deposition.

Can we agree on a time now, Mr. Brown?

Mr. Brown: I suggest the deposition be continued to a date that is convenient.

Mr. Levit: I would say this, that we must have, in order to go before the court, a transcript of the testimony thus far, and if Mr. Hart will tell us when that transcript will be available, I can say when I think we can take it before the court.

The Reporter: Next Tuesday. [26]

The Witness: Can't we make it after the 9th?

Mr. Levit: You say the transcript will be ready next Tuesday?

(Deposition of Anson Herrick.)

The Reporter: Yes.

Mr. Levit: Well, then, we suggest that the deposition be continued to some mutually agreeable date after September 8th so we can present the matter to the court on its law and motion date on September 8th.

What date would be agreeable to you, Mr. Brown?

Mr. Brown: Mr. Herrick is going to be out of town until the 9th.

The Witness: The 9th is a holiday.

Mr. Brown: Let us make it on the 10th or the 11th, whichever is convenient.

The Witness: Well, frankly, if you can make it the 11th, that would be better, because the 10th will be the first day I will be back.

Mr. Levit: Then we will ask the notary to order that the deposition be suspended pending further order of the court, and until at least 9:30 a.m., at the same place, on September 11th, 1947, subject to whatever order the court may make upon that presentation.

The Notary Public: It is so ordered. [27]

(Deposition of Anson Herrick.)

Offices of Messrs. Severson, Brown, Keough &
McCallum, Room 1004, 605 Market Street, San
Francisco, California,

Wednesday, March 3rd, 1948,
10:00 o'clock A.M.

Pursuant to adjournment, the deposition of the
witness

ANSON HERRICK

at the above time and place was resumed.

Present: Bert W. Levit, Esquire, representing
Messrs. Long & Levit, attorneys for the
plaintiffs.

Harold Clinton Brown, Esquire, repre-
senting Messrs. Severson, Brown,
Keough & McCallum, and Paul Barnett,
Esquire, representing Messrs. Watson,
Ess, Barnett, Whittaker & Marshall,
attorneys for the defendant.

Harold H. Hart, shorthand reporter.

(Unreported discussion.)

Mr. Levit: May I suggest that we start with the
stipulation that the notary may be excused, subject
to recall at the request of either party, if desired.

Mr. Barnett: It is so stipulated. Isn't that
right?

Mr. Brown: Yes. It is stipulated that the wit-

(Deposition of Anson Herrick.)

ness has already been sworn, and is under oath at present. [28]

ANSON HERRICK

recalled as a witness on behalf of the defendant, having been previously duly cautioned and sworn by the notary public to tell the truth, the whole truth, and nothing but the truth, testified as follows:

By Mr. Barnett:

Q. I will show you, Mr. Herrick, a proof of claim that is printed, and I will ask you if that is a true copy of the proof of claim which was turned over to you by the parties as having been filed by the Pickering Lumber Corporation with the insurance company?

Mr. Levit: May I request a clarification of what you mean by "the parties"? You mean both the insured and the insurer?

Mr. Barnett: Yes.

Mr. Levit: I will have no objection to the question, because it is preliminary, but before any further questions are asked, I want to interpose an objection.

A. I received a printed proof of loss which I presume this is a true copy of.

Q. (By Mr. Barnett): Who delivered it to you? A. Frankly, I have forgotten.

Q. This proof of loss undoubtedly was sent to you after your appointment, I take it?

(Deposition of Anson Herrick.)

A. I think it was Mr. Herrington who at that time was cooperating with you. [29]

Mr. Levit: Mr. Herrington of the firm of Orrick, Dahlquist, and so forth? A. Yes.

Mr. Barnett: Who at that time was acting as legal counsel for the Pickering Lumber Corporation.

I will ask that it be marked as an exhibit, and made a part of the deposition.

(Printed copy of document headed "Pickering Lumber Corporation, Final Proof of Loss," marked "Defendant's Exhibit 2.")

Q. (By Mr. Barnett): You did in fact hold hearings, did you not? A. Yes.

Q. You did not swear any witnesses?

A. No.

Q. You took their statements unsworn?

A. That is correct.

Q. Do you remember who appeared before you as witnesses?

A. I had better refer to my record.

Q. If you have one, that would be better.

A. The following appeared: Frank Momyer—

Mr. Levit: Before the witness testifies, I would like to see the record that he is referring to in giving this testimony.

A. I am testifying from the notes relating to the hearing of the matter by the appraisers, the matter being "In re Pickering Lumber Corporation Business Interruption Loss Insurance Claim."

(Deposition of Anson Herrick.)

Q. (By Mr. Levit): Who prepared those notes, Mr. Herrick? [30]

A. I prepared those notes.

Q. Approximately when?

A. By dictation immediately after the hearing, and from my original pencil notes.

Q. Do you also have in your files your original pencil notes? A. Yes, right here.

Q. (By Mr. Barnett): By refreshing your memory, can you tell me what witnesses appeared before the appraisers?

A. Yes. Frank Momyer, secretary-treasurer, Pickering Lumber Corporation; Ben Johnson, chairman of the board of directors of Pickering Lumber Corporation; Paul Barnett, of Watson, Ess, Barnett, Whittaker & Marshall.

Q. (By Mr. Levit): That is the gentleman who is taking this deposition, is it not?

A. Right. Counsel for Pickering Lumber Corporation. George Herrington, associated attorney with Paul Barnett; W. H. Thomas, of Thomas and Jackson, Portland, Oregon, forest engineer; Walter——

Q. (By Mr. Levit): Whom did he represent, if you know?

A. He was a witness on behalf of Pickering.

Mr. Levit: Pardon me. This is off the record.

(Unreported discussion.)

The Witness: A. Walter S. Kennon, sales manager of Pickering Lumber Corporation; J. C.

(Deposition of Anson Herrick.)

Lucas, of the firm of Robinson, Nowell & Co., certified public accountants, accountants for Pickering Lumber Corporation; Kenneth W. Withers, of Fire Companies' Adjustment Bureau, Inc.; Wilfred Ball. [31]

Q. (By Mr. Barnett): Appearing for whom?

A. Appearing for the insurers.

Q. Yes.

A. Wilfred N. Ball, Fire Companies' Adjustment Bureau, Inc., also appearing for the insurers; Frank Baker, public accountant, appearing for the insurers; Curt F. Setzer, box factory operator, and a witness for Pickering; and Mr. Lee Moffett of Western Pine Association, a witness for Pickering.

Q. I notice that you included as those that appeared Paul Barnett. That is I?

A. That's right.

Q. I was asking about witnesses. Is it your recollection that I gave evidence, or did you put it down on the theory of witnesses that weren't sworn and that made statements?

A. No, I don't think you gave evidence. You interrogated the witnesses for the Pickering Lumber Corporation.

Q. But I did appear?

A. You did appear.

Q. Did you or did you not require the production of Pickering Lumber Company's books and records at that hearing?

A. No.

(Deposition of Anson Herrick.)

Q. You depended, not on the way they were handled but on the actual amounts—the amounts reported in the Pickering Lumber Company's proof of claim as testified to by its accountant and its treasurer, is that right?

A. We took into consideration the proof of claim, the computation made by Mr. Baker appearing for the insurers, and also had reference to the examination reports of Nowell, [32] Robinson & Co., and various other data relating to sales and production variously obtained either from Mr. Baker or from the Pickering Lumber Corporation.

Q. Then after the hearing was over, did you decide that you needed further information?

A. - Yes.

Q. And called for it? A. Yes.

Q. From different sources?

A. We requested additional information from the Pickering Lumber Corporation, and from their accountants, Nowell, Robinson. I think that was all.

Q. The other appraiser told you that he had consulted with other accountants about it?

A. During the progress of the consideration by him, yes.

Q. I mean after the hearing? A. Yes.

Q. But what I was getting at is this: In addition to the proof—not in the way that it has been handled, but to the extent that the figures showed in the proof of claim, those were the same figures

(Deposition of Anson Herrick.)

that were used by the accountants for the insurance companies, were they not?

A. I think that should be answered "yes." He used almost throughout either the figures shown by the proof of loss, or if those figures were subject to certain designated modifications.

Q. But the modifications were not on the theory that anything had been falsely put down on the books? A. No, no.

Mr. Levit: Just a moment. At this point I am going to [33] interpose a partial objection, or perhaps a suggestion, that inasmuch as this deposition is being taken by the defendant, and the witness is a witness for the defendant, I am going to object to each——

Mr. Barnett: Any leading question?

Mr. Levit: To any questions of that type or of any other type.

Mr. Barnett: I will try to remember. When you are on ground that you assume there is no controversy about, it is hard to remember that technical distinction; but I will try to keep it in mind.

Mr. Levit: I didn't mean to be critical, sir.

Mr. Barnett: No, no, I know you didn't.

Q. What was the name of the accountant that appeared for the insurance companies?

A. Frank Baker.

Q. And he also filed a statement showing what the claim of loss was? A. Yes.

Q. You might say a counterpart of the Picker-

(Deposition of Anson Herrick.)

ing's proof of claim, but coming to a different conclusion. A. You can't say a counterpart.

Q. Well, I mean serving the same function.

A. He used the data shown by the proof of loss, and with certain modifications of factors that entered into it, and by the adoption of different principles of allocation, came to a different result.

Q. He did not use any figures other than the way they [34] were handled, or whether they went in or whether they went out, than those which Pickering claimed were revealed by its book? I am now not talking about allocation; I am not now talking about the theory as to whether they should be included or not included; but he took the basic figures from which Pickering had made up its claim?

Mr. Levit: Just a moment, Mr. Herrick.

I object to that on the ground that it is leading and suggestive; and further on the ground that it calls for the conclusion of the witness.

Mr. Barnett: Well, he is an expert.

Mr. Levit: And asking for hearsay testimony.

Mr. Barnett: The testimony shows that he is an expert; and I want him to tell what the effect of that was.

Mr. Levit: I have in mind, of course, that he is qualified as an expert; and if the question related to any expert opinion of his, I wouldn't object to it on that ground. I don't think it does.

Mr. Barnett: I believe it does.

Q. What is your opinion on it, Mr. Herrick?

(Deposition of Anson Herrick.)

A. I have no recollection that he disputed any of the amounts as shown by the proof of loss.

Q. But he did——

A. With the possible exception—you might call it a dispute—the amount considered as the cost of depletion.

Q. The cost of what? [35]

A. Depletion. The stumpage.

Q. That's right. I had forgotten about that.

A. And that I don't think should really be called a dispute. It was merely the adoption of a different figure on a different theory.

Q. Did you understand that he disputed the basic facts from which Pickering had arrived at his figure of depletion?

Mr. Levit: I am going to make the same objection again, that it calls for the conclusion of the witness, as to what he understood. I have no objection to the witness testifying to any of the facts that occurred while this appraisal was going on; but for the witness to draw conclusions as to what he understood someone else to mean, I think that is——

Mr. Barnett: I think that is the ultimate question involved in this, the understanding of the appraisals which caused them to do what they did do; that is what we are trying to find out.

Q. If you can answer the question, please do so; and if not, all right.

A. No, I don't think I can answer the question.

(Deposition of Anson Herrick.)

Q. That is all right. Do you have the statement that was prepared by Mr. Baker—is that his name?

A. Yes.

Q. (Continuing): —Mr. Baker and filed with the appraisers? A. I have.

Q. May I have it, please? [36]

(Witness hands document to Mr. Barnett.)

Q. This is the original that was filed by him?

A. I don't know whether that is the original. In fact, I think it is a copy.

Q. Did you prepare the copy, or was it filed with you, or was there more than one?

A. Well, it was provided to me I think by Mr. Baker directly. I don't think there was any formal presentation of it on behalf of the insurers. It was given to me, I think, personally by Mr. Baker.

Q. He did that at the hearing, did he not?

A. I think it was at the hearing.

Q. I notice a lot of figures here in pencil. Were those figures on it when it was furnished by Mr. Baker? A. No.

Q. Who put those on there? A. I did.

Q. So those are your own notes that you made in trying to arrive at what you thought was the proper conclusions to arrive at in this case?

A. Well, those are a very few.

Q. I know. I don't claim that it is your accounting. I mean, you made them to aid you—as you came to something and wanted to remember what you thought about it, you made a note?

(Deposition of Anson Herrick.)

A. That's correct.

Mr. Barnett: I offer this Mr. Baker's statement in evidence. [37]

A. Well, now, that is from my records; and if you want that in evidence, I will have photostat copies made of it.

Mr. Barnett: Yes. I will offer it in evidence; but I will, if it is agreeable with you, have the stenographer make a photostatic copy to attach to the deposition, and return this one to Mr. Herrick. Do you agree to that?

Mr. Levit: Yes. I would like to look at those notes.

(Computations made by Mr. Baker marked "Defendant's Exhibit 3.")

(Unreported discussion.)

Mr. Levit: Let the record show that we will require on our copy of the deposition photostats of all exhibits, or copies of all exhibits, except as may be noted from time to time. We will not require a copy of Exhibit 2, as we already have a copy of that.

Mr. Barnett: Why can't we just tell him which we want at the end, or give him a list of what we want or don't want.

Mr. Levit: Yes.

Q. (By Mr. Barnett): Since I noticed that you have made notes on the statement prepared by

(Deposition of Anson Herrick.)

Mr. Baker, did you make any pencil notes on the proof of claim that was furnished to you?

A. Some, yes.

Q. Do you have the one that you made the notes on?

A. Yes, there are certain notes, Judge; but I think they would be largely unintelligible to anyone outside of myself; and many of them are of such a nature that probably I have [38] forgotten at the present time just why I made them.

I might say that the greater part of the notes are related to certain errors of inconsequential amounts which were pointed out by the witness, Mr. Momyer, at the hearing.

Q. In that connection, after the proof of claim was prepared and filed with the insurance company, and the appraisers were appointed, is it or is it not true that I put Mr. Momyer on the stand, and pointed out certain lump accounting expenses for telegrams, telephones, and things like that; and asked him to point out those that applied to trying to collect the insurance, and trying to tend to the Texas Oil, and trying to sell the Big Trees as a state park; and asked him how many of those applied to that? Do you remember that?

A. Yes, clearly.

Q. And that he pointed out a certain amount; and then there was an admission made by me that those ought not to have been included?

A. That's right. The corrected amount of those was something under a thousand dollars.

(Deposition of Anson Herrick.)

Q. Some seven hundred and something dollars?

A. Your memory is better than mine.

Q. Well——

A. Because that—that amount of some seven hundred dollars was in my mind, but I hesitated to state that because up to a thousand——

Q. I am not trying to pin you down. But after that had all been done by the accountants, it is true that I took up [39] the amount of the telegrams and telephones, and so forth, and asked them to go through, and to pick out every one, and the amount of it that applied to try to sell the Big Trees as a state park, and pertaining to the Louisiana Oil matter, and trying to collect the insurance.

A. Yes.

Q. For the main part, are those the notes you have made on the proof of claim?

A. Yes.

Q. Made at the time because they were in the nature of admissions that they had been incorrectly included?

A. That's right.

Q. Is that about all the notes show?

A. I think that is about right.

Q. I don't want to put this in evidence if there is nothing to it. That is all I am going to do——

A. Frankly, yes. Let me assure you, Judge, that those very few notes relate to the matter just discussed—that is, the matter of incorrect conclusions, and are wholly immaterial.

Q. I will take your assurance. I just wanted

(Deposition of Anson Herrick.)

to see whether we would want to put that in as an exhibit. I don't think so.

After the hearings were over, did Pickering Lumber Company's lawyers file suggestions with your appraisers, setting out their claim and the theory of it? A. Yes.

Q. Do you have it?

A. Yes, there was a brief filed on behalf of the Pickering Lumber Corporation by [40] Paul Barnett and George Herrington.

(Unreported discussion.)

Mr. Barnett: May I have the brief that was furnished to you?

Mr. Levit: Let me look at it before you ask any questions about it.

(Document handed by witness to Mr. Barnett.)

Mr. Barnett: I offer it in evidence. Now, Mr.——

A. I might call your attention to the fact that in this folder are not only the briefs but also a letter and a memorandum.

Mr. Levit: Could we have that, please?

A. (Continuing): ——filed by—a letter dated April 4th.

Mr. Levit: April 4th——

A. 1947.

Mr. Levit: From——

A. And an accompanying memorandum to the

(Deposition of Anson Herrick.)

appraisers from K. W. Withers of the Fire Companies' Adjustment Bureau.

Mr. Levit: To whom is the letter addressed?

A. To the appraisers, Maloney and Herrick.

Mr. Barnett: I think I know what it is, but let me see it. I was going to ask you that next, but since you have——

(Witness hands document to Mr. Barnett.)

Mr. Barnett: I offer in evidence the brief.

(Document entitled "Brief of Pickering Lumber Corporation" marked "Defendant's Exhibit 4.")

Q. (By Mr. Barnett): Mr. Herrick, you have called my attention [41] that in this file which you have handed me, in addition to the brief that I have just offered in evidence, is the original of a letter dated April 4th, 1947, addressed to Mr. Frank Maloney and Mr. Anson Herrick, who are the two appraisers, aren't they?

A. That is correct.

Q. Signed by Mr. K. W. Withers, executive general adjuster for the insurance companies. Is that not the same letter a copy of which was put in as Exhibit 1 when this deposition was first begun?

A. Yes, that is the letter.

Q. That is the same letter. It is understood that the original letter is offered in evidence, but that the copy may be attached and the original returned to Mr. Herrick.

(Deposition of Anson Herrick.)

Mr. Levit: What number is that, Mr. Hart?

The Reporter: Defendant's Exhibit 1.

Mr. Barnett: The brief is No. 4.

Q. Did Mr. Withers and Mr. Hall also file with you a written instrument which was entitled "Memorandum to Appraisers, Pickering Lumber Corporation Claim, Fire—July 7, 1945"?

A. Yes.

Q. And is this it? A. That is it.

Q. And you are looking at it?

A. That is it.

Mr. Barnett: I offer that in evidence as Exhibit No. 5.

(Copy of document headed "Memorandum to Appraisers, Pickering Lumber Corporation Claim, Fire—July 7, 1945," marked "Defendant's Exhibit 5.")

Mr. Levit: I have a copy of that. [42]

Mr. Barnett: Yes, you have a copy of that.

Q. Within the time—not within the time as specified by the policy, but within the extended time agreed on by the parties by stipulation, did the—. It is true there was a stipulation extending the time?

A. There was a stipulation extending the time.

Q. But within the time so extended, did the appraisers make a report? A. They did.

Q. Do you have that report?

A. Yes; or, rather, a copy of it.

Q. Look at that. I am going to give that to

(Deposition of Anson Herrick.)

the reporter if there is nothing wrong with it. If there is anything wrong with it, I am just as anxious to know as you are.

A. That is a copy.

Mr. Barnett: I offer it in evidence as Exhibit 6.

(Copy of letter on letterhead of Lester Herrick, and Herrick, dated May 2, 1947, signed Anson Herrick, and addressed to Pickering Lumber Corporation, together with attached "Award and Other Findings of the Appraisers," marked "Defendant's Exhibit 6.")

Q. (By Mr. Barnett): Mr. Herrick, at the time when we had this hearing set, and Mr. Levit was tied up in court and couldn't attend, at about that time——

Mr. Levit: What time are you talking about? What hearing?

Mr. Barnett: The hearing for this deposition. You remember that this deposition was continued on account of [43] objection and a motion; and then after that, why, there was a notice to take the deposition; and then it turned out that Mr. Levit was in court, and couldn't attend, and it was not set at that time.

A. I recall.

Q. You remember the occasion?

A. I remember.

Q. At or about that time, did you make an outline indicating the differences between what the appraisers allowed and what had been claimed by the Pickering Lumber Corporation?

(Deposition of Anson Herrick.)

A. I did.

Q. Do you have it? A. Yes.

Q. May I have it, please?

Mr. Levit: What was the approximate date on which that was prepared, Mr. Herrick?

Mr. Barnett: That is as close as I can tell you. I was giving you the occasion, but I can't give you the date.

A. I could ascertain the exact date by referring to my letter file containing a copy of the accompanying letter; but this is an undated memorandum.

Mr. Levit: At any rate, it was after——

Mr. Barnett: It was after——

Mr. Levit: It was after the suit was filed, wasn't it? A. Oh, yes.

Mr. Barnett: Oh, it was after the appraisers report.

A. It was within a month or six weeks after the report was furnished to you. [44]

Mr. Levit: I am just trying to fix the date. I know when it was.

Mr. Barnett: It was when we tried to resume this deposition after the motions had been made in court, but we couldn't get it up. May I see it, please?

(Unreported discussion.)

Mr. Barnett: I want to use it as an outline rather than to go through that great long claim.

Do you have a copy of this?

(Deposition of Anson Herrick.)

Mr. Brown: Yes, I have.

Mr. Barnett: Let me have it, will you please? I am going to return this to Mr. Herrick to refresh your memory. This is not anything that the appraisers as such prepared, is it?

A. No.

Q. It is a memorandum that you yourself prepared?

A. It is a memorandum that I prepared as a convenience to you and Mr. Brown for the purpose of developing the differences between the claim as made originally and the findings of the appraisers.

Q. (By Mr. Levit): At whose request was it prepared?

A. The request of Judge Barnett; and, if I recall correctly, Mr. Levit, with your consent.

Mr. Barnett: That was what I understood.

Mr. Levit: I would like to make it perfectly clear for the record that we have always contended and still contend that this approach is entirely irrelevant to any issue in [45] the case; and the analysis that Mr. Herrick made of the award or of the difference is incompetent, irrelevant and immaterial; and I propose to object to it. It is quite true that I offered no objection to Mr. Herrick complying with your request to prepare this schedule of differences; and he agreed that when it was prepared, he would furnish me with a copy, which he did; but I don't want the record to even

(Deposition of Anson Herrick.)

suggest that I in any way agreed or consented that any of the data contained in the report was admissible in evidence.

Mr. Barnett: I understand that perfectly; and I asked him for this in order that we might both be talking about the same thing; and when I asked him about a figure, that he could look immediately and see what figure I was talking about. I didn't understand that Mr. Levit's consent that this analysis be furnished to me has anything to do with the position that he has taken in this lawsuit; but only that he had no objection to my proceeding in an easier way than a hard way; but that he still objected; and whether I did it the easier way or the hard way, that it shouldn't be done at all. That is the way I understood it.

Mr. Levit: That is substantially correct.

Mr. Barnett: Yes, and I am not offering it as an admission in any way. The fact is, I am not offering it at all. I am trying to identify a memorandum which I am about to use, and which I will call to his attention when I ask him the questions. That's all. [48]

Q. Now, on this memorandum that we are just now talking about, at the very top appears this: "Operating income, total \$370,036.00." Is that what the appraisers found the total operating income was, or is that what we claimed it was?

Mr. Levit: Just a moment. I am going to object to the question on two grounds: In the first

(Deposition of Anson Herrick.)

place, I am going to object to any questioning with regard to this memorandum at all, and on this point at all, because it is entirely irrelevant and incompetent; it is not proper to impeach the award. Further, I am going to object to any references to the memorandum unless the memorandum itself is offered in evidence; and if it is offered, of course, I will object to it; but my objection on the second point is a technical one: That unless the memorandum is offered in evidence, the witness wouldn't be permitted to refer to it.

Mr. Barnett: I am not arguing with you on that.

I offer this in evidence; and then let me have it back. I want to use it.

Mr. Levit: To which we object on the grounds already stated; it is incompetent and irrelevant to any issue in the case; and it is not proper evidence with relation to any impeachment of the award.

(Document entitled "In re Pickering Lumber Corporation, B. I. Loss Claim, Finally Revised Computation," marked "Defendant's Exhibit 7.")

Q. (By Mr. Barnett): What is the figure of \$370,036.00, the [47] very first figure on Exhibit 7, just introduced, Mr. Herrick?

Mr. Levit: May it be stipulated that our objection goes to this entire line of questioning?

Mr. Barnett: Certainly, certainly.

(Deposition of Anson Herrick.)

A. That was the finding of the appraisers with respect to the operating income to be used as the base for the determination of the award.

Q. For the nine months or for the twelve months?

A. I might specify that that was the expected operating income for a period of twelve months.

Q. Do you know wherein that differed from the amount of the claim of the Pickering Lumber Corporation?

A. It was \$11,578.00 more than the amount of the—than the corresponding amount claimed by Pickering.

Q. Eleven thousand how much?

A. \$578.00.

Q. Can you account for the difference?

A. The operating income was computed by the insured as 53,607 feet at \$6.68 per thousand; and the appraisers considered the rate in error, and substituted a rate of \$6.90 per thousand; the difference of \$.22—

Q. Twenty-two cents per thousand—

A. The difference of twenty-two cents per thousand constituting the \$11,578.00.

Q. Do you know why the appraisers added twenty-two cents per thousand profit?

A. I have a general recollection; but to describe it adequately would necessitate [48] considerable refreshing of my recollection, and a very extensive explanation.

Q. Maybe if you had the key, we could figure it

(Deposition of Anson Herrick.)

for ourselves. What is your general recollection of it?

Mr. Levit: Let the record show the witness pauses at this point to consult various other papers in his file.

A. Well, this is off the record.

(Unreported discussion.)

Mr. Levit: I am going to request that this be on the record.

The Witness: Well, I don't seem to find my—a paper that will lead me to an appropriate answer.

Q. (By Mr. Levit): Well, then, I suggest that you so state.

Mr. Barnett: Well, just a minute. I will find out.

(Addressing Mr. Momyer): Do you know what it was?

Mr. Levit: Wait just a minute.

Mr. Barnett: I mean——

Mr. Levit: I am going to object.

Mr. Barnett: I will take him outside if you want me to, but if you——

Mr. Levit: I have no objection to counsel withdrawing for a discussion.

Mr. Barnett: Just let me see whether or not there is anything that we have got here that is worthwhile going in.

(Deposition of Anson Herrick.)

(Mr. Barnett, Mr. Brown and Mr. Momyer leave the room, subsequently returning.)

Mr. Barnett: He doesn't remember, [49] either.

Q. I want you to continue your search if you think you can find it, Mr. Herrick; and if you can't find it——

A. Well, I certainly can determine the reason; but I can't do it at this moment.

Q. Very well. Let us go on to the next thing. Let me say this: You have got that divided up between shook and lumber; and this exhibit indicates that you have got \$300,547.00 of that income from shook, and \$69,489.00 from lumber. Do you remember how you arrived at that division?

A. Have you got that Pickering report? It was based upon an allocation by methods which the appraisers jointly believed to be correct.

Q. Well, I have no doubt of that; but I was trying to find out the theory of it. Is that too board a question, or should I split it up? If so, I want to do it.

A. It is a pretty broad question, Judge; and it is a question that comes right down to the various extended considerations of the appraisers——

Q. In other words, that is not one question embracing——

A. Embracing matters of opinion, joined matters of opinion, compromise matters of opinion; a great many different things; and that is a question that is practically impossible to answer.

(Deposition of Anson Herrick.)

Q. In one question? A. Yes.

Q. I have asked you to tell me everything you have done, practically? [50]

A. Well, it seems to me that that question goes into the matter involving the details of the considerations——

Q. All right.

A. And the opinions of the appraisers.

Q. Yes. All right. The next thing on there you have got "Fixed charges and continuing costs," a total of——

By the way, we are still talking of the entire twelve months and not the nine months?

A. That's right.

Q. And for the twelve months, you have got "Fixed Charges and continuing costs, \$660,175.00." That, of course, was under item 2 of the insuring clause, fixed charges and continuing expenses, was it not? A. That's right.

Q. Was that more or less than had been put in by the claim of the Pickering Lumber Corporation?

Mr. Levit: I object to that on the ground that it calls for the conclusion of the witness. The figures speak for themselves.

Mr. Barnett: Yes, I know, but I want him to find them for me, because he is more apt than I.

A. It was more.

Q. How much more? A. \$15,095.00.

Q. Can you account for that?

(Deposition of Anson Herrick.)

A. With the exception of \$53.00, it constituted the depreciation on the destroyed property which had been omitted in part from the claim. [51]

Q. In other words, in fixing the amount of fixed charges and continuing expenses for the entire year, you added depreciation on the property that had been destroyed? A. That's right.

Q. Did you add any part of that into the fixed charges and continuing costs for the nine months?

A. Yes.

Q. Is that the one that you say later was eliminated?

The Witness: Can this be off the record?

Mr. Barnett: Yes.

(Unreported discussion.)

The Witness: Are you referring to an elimination on this statement.

Mr. Barnett: Well, I will have to look at it myself.

The Witness: I think you are referring to a correction in the Pickering computation which he made——

Q. (By Mr. Barnett): Let me look at this. Look at page 3 of the statement. No, no, that is not it. Look at page 4, item 6, "Elimination of item included in 4." What is that?

A. The item of \$11,178.00 mentioned as a part of item 4 on page 4 of the statement represents the inclusion within fixed charges and continuing expenses of the proportionate part of this depre-

(Deposition of Anson Herrick.)

ciation applicable to the loss period, which was subsequently taken back as a recovery item.

Q. Well, now, see if this is correct: You first, in calculating fixed charges and continuing expenses under part 2 of the insuring clause, included fifteen thousand and some [52] dollars depreciation on the destroyed property.

A. That is correct.

Q. And there didn't any depreciation occur after it was destroyed?

A. I beg your pardon. Wait a minute. No, that's right. State the question again, please.

Q. There was no evidence that there should not have been any depreciation on the property after it was destroyed?

A. That's right.

Q. Why did you put it in in the twelve months period?

A. Because in determining your insurable value, it is necessary.

Q. For the twelve months period?

A. For the twelve months period, it is necessary to consider all continuing expenses, whereas in the computation of your loss you include only those expenses which necessarily continue.

Q. You are now talking about the contribution clause, is that the idea?

A. Yes.

Q. There is a provision—

A. To the extent that the contribution clause depends upon the so-called insurable value.

Q. When you say insurable value, you mean net profits and continuing expense?

(Deposition of Anson Herrick.)

A. That's right.

Q. Clause 4 of the policy provides: "It is expressly stipulated and made a condition of this contract that, in the [53] event of loss, this company shall be liable for no greater proportion thereof than the amount hereby insured bears to seventy-five per cent of the total of the net profits (Item I) and charges and expenses (as specified in Item II) which would normally have been earned during the period of twelve months immediately following the fire."

Is that the provision that you have in mind?

A. That is.

Q. And it was your idea—I am not arguing—I am trying to find out what happened, you see. It was your idea that to find out what would normally have happened during the twelve months, that normally there would have been that much depreciation?

A. That's right.

Q. And for that reason, it should have been added to the twelve months?

A. That's right.

Q. As a normal year?

A. That's right.

Q. But that while you put it in, you took it out again? You ultimately didn't allow it in the schedule on the ground that it didn't occur?

A. That is correct.

Q. In other words, because the policy says "would normally have been earned," in making the twelve months calculation you did not do it on the same basis that you did on the nine months?

(Deposition of Anson Herrick.)

A. That's correct.

Q. One was that it would have been, and the other was what it actually was?

A. That is correct.

Q. Did you add anything else besides that fifteen thousand [54] and some dollars in raising the twelve months profit figure presented by Pickering?

A. An item of \$53.00, which is the culmination of various adjustments, and the basis of which I don't recall, but none being of significance.

Q. What I mean, for instance, if the fire hadn't occurred, and it would have been a normal year following the fire, there would have been expense of millhands and things like that in running that mill. You didn't include that? A. No.

Q. Just that one thing, except for a few very minor matters which make a total of some fifty odd dollars?

A. That's right. In other words, there was no dispute as between the company and the insurers with respect to the computation of the amount of continuing expenses with the exception of this one item.

Q. The others were minor details?

A. Minor details.

Q. Which you picked up yourself as an accountant?

A. No, I think they were the net of a number

(Deposition of Anson Herrick.)

of variations due to a difference in the procedure adopted by Baker and by the company.

Q. (By Mr. Levit): When you refer to the company, of course, you are referring to the insured?

A. Pickering Lumber Company, the insured.

Q. (By Mr. Barnett): When you say the company, you mean the [55] Pickering Lumber Company?

A. The Pickering Lumber Corporation.

Q. When you say Baker, you are talking about the accountant of the insurance company?

A. Of the insurer.

Q. There was a figure of \$1057.18 which in Mr. Baker's—

Mr. Levit: One thousand and what?

Mr. Barnett: \$1057.18, which in Mr. Baker's statement, he called it adjustments to annual value. Did the appraisers adopt that adjustment?

Mr. Levit: If you remember, Mr. Herrick.

A. Where did that figure appear?

Q. (By Mr. Barnett): You ask me a question, and that means I have got to go to work. We will find it for you in a minute. I am not apt about these things. I have to have help.

What I meant by that, Mr. Herrick, is this: In Mr. Baker's statement under the heading "Insurable value and loss sustained based on experience from April 1st, 1944, to March 31st, 1945, and continuing costs during shutdown," the top page,

(Deposition of Anson Herrick.)

he shows this (Defendant's Exhibit 3 shown to the witness). A. I see.

Q. And we have accounted for the fifteen thousand and some dollars, but we haven't accounted for that other, and that is in his total.

Mr. Levit: For the purpose of the record, let the record [56] show that counsel is referring to Defendant's Exhibit 3, the first large page, the last column, where the total appears of 13,984.99, and two lines above it, the figure of 15,042.17; and the difference between the two would be what counsel is asking the witness.

Mr. Barnett: I am asking him whether they adopted that or not.

Mr. Levit: Let the record show that while this question was being asked, Mr. Herrick made certain pen and ink notations about that last column on the sheet that I have just referred to, in which he subtracted the smaller of those two figures from the larger, and arrived at a differential figure of 1057.18.

Mr. Barnett: Yes, which is the figure I asked him about.

Mr. Levit: Correct. May I suggest, Mr. Herrick, that you don't mark these exhibits, but use some scratch paper?

A. All right. I have indicated that I made that note on March 3rd, 1948.

Q. (By Mr. Barnett): All right. I am not taking any exception to anything that he has in-

(Deposition of Anson Herrick.)

served in there. It is perfectly proper that he should. He is just trying to keep it straight.

Can you tell me whether or not the appraisers adopted that or not? Can you tell by your notes?

A. My conclusion is that we did not, because our difference in that is only \$53.00 in comparison with \$1057.00.

Q. In other words, your conclusion from the amount of [57] differences between by your figure and this is that you did not go along entirely with it?

A. That's right.

Q. To some extent, but not entirely. But the whole thing, so far as the appraisers were concerned, came to——

A. \$53.00.

Q. And so we will let that go.

There is an item of \$211.46 by which you reduced the amount you finally found. Do you know what that was for?

Mr. Levit: What was that figure again?

Mr. Barnett: \$211.46.

Mr. Levit: Where do you find that here, Judge Barnett?

Mr. Barnett: I will find it for you in a minute, if I haven't lost my papers, which I probably have. I am now——

The Witness: I think you are referring to page 3.

Mr. Barnett: Of the analysis which you got up?

A. Yes.

Q. That we are using as an outline?

A. That's right.

(Deposition of Anson Herrick.)

Q. Oh, yes, right down at the bottom of page 3, it says "As shown by finally revised computation of loss 660,175, less arbitrary reduction to produce a total of \$1,030,000," and it says \$211.00. I said \$211.44.

Mr. Levit: Forty-six cents, I think you said.

Mr. Barnett: Did I?

Mr. Levit: Yes.

Mr. Barnett: Well, all right. [58]

Q. What was that for?

A. Just exactly what it says, Judge.

Q. Maybe it is perfectly plain what you did, but what I mean is why did you do it?

A. To arrive at the insurable value of the amount of \$1,030,000.00, in recognition that no computation—no finding of such an amount in such a matter is capable of being asserted to be correct within the dollar.

Q. In other words, you made a computation; and if you stuck to it, the award was going to end up in odd cents, and you just reduced it \$211.00, to make a round figure of it? A. That's right.

Q. All right. Off the record.

(Unreported discussion.)

Q. (By Mr. Barnett): In these same figures, under the 660,175, you following up by showing \$35,608.00 of that is fixed charges and continuing expense applicable to shook, and \$272,477.00 to lumber, and \$352,090.00 to logs.

(Deposition of Anson Herrick.)

Mr. Levit: May I point out, Judge, I think you misread the top figure.

Mr. Brown: That is right, he did misread it.

Mr. Barnett: Well, if I said six, I mean five. It should be \$35,608.00.

Mr. Levit: I think you said thirty-six.

Mr. Barnett: \$35,608.00.

The Witness: Will you restate the question?

Mr. Barnett: I have only made a statement so far; and I say the fixed charges and continuing expense, of a total of \$660,175.00, you have allocated as follows: \$35,608.00 to shook; \$272,477.00 to lumber; and \$352,090.00 to logs.

Mr. Levit: Pardon me just a moment. In order to clarify this, may I suggest that the reporter be instructed to number the pages of Exhibit 7 in this order:

Page No. 1 to be the page headed "Finally Revised Computation";

Page No. 2, the page headed "Box Factory 'Salvage' Statement";

Page No. 3, headed "Reconcilement of Insurable Value and Loss as Claimed with Appraisal"; and

Page No. 4, headed on the left "Composition of appraisal changes."

And may I further state that the figures to which counsel has just referred are on page 1 on the second line. May it be so stipulated?

Mr. Barnett: Certainly. It helps out.

The Witness: Your statement is a little in-

(Deposition of Anson Herrick.)

correct, Judge. The allocation which you mentioned is headed by the statement "per Baker."

Q. (By Mr. Barnett): Oh, that isn't what you did?
A. No.

Q. That is what the accountant for the insurance companies did?
A. That's right. [60]

Q. Yes, it does say "per Baker." Well, on your statement, do you show how you did it?

A. Yes.

Q. And on what page?

A. On the same page. We increased Baker's allocation to shook by \$4,311.00; we increased the allocation to lumber by \$16,417.00; and decreased the allocation to logs by \$20,728.00.

Q. And that is the reason you have got in parantheses \$20,728.00 up there, to indicate where you——

A. To indicate that that is a reduction.

Q. From Baker's figures. Not from the insurance companies' but the Baker report figure?

A. That's right.

Q. Can you tell us how you arrived at it? We are now talking about the whole year, are we?

A. We are talking about the whole year.

Q. And we are only talking about fixed charges and continuing expenses?
A. Right.

Q. All right.

A. Mr. Baker has allocated——

Mr. Levit: Let the record show that the witness

(Deposition of Anson Herrick.)

is now referring—is now using and referring to Defendant's Exhibit 3.

A. (Continuing): —a percentage which the appraisers considered excessive, and which the appraisers reduced to thirty-five per cent.

Q. (By Mr. Barnett): The percentages used by the appraisers are shown under the next computation entitled "Total annual, [61] portion applicable to period April 7th to July 7th, 1946," am I right?

A. No, the percentage used by the appraisers is shown under the caption "To reduce logging overhead to 35%."

Q. Where is that?

Mr. Levit: It is right under the words "per Baker" on page 1 of Exhibit 7.

Mr. Barnett: Oh, I see. You haven't got that all together. You show what your reduction amounted to.

A. That is correct.

Q. What was Mr. Baker's percentage, do you remember?

A. 43.45%.

Mr. Levit: Let the record show that the witness refers to Exhibit 3, Schedule No. 3, and the penciled figure in the last column on that page.

Q. (By Mr. Barnett): Do you remember how the appraisers arrived at 35% on the percentage applicable to logging?

A. On the bases of their experience and opinion.

Q. Did you not use any rule?

A. No.

Q. Did they take into consideration any evidence upon which they applied their judgment?

(Deposition of Anson Herrick.)

A. They gave consideration to evidence, yes.

Q. As to the amount of logs and the amount of lumber and the amount of shook?

A. They gave consideration to testimony which had been presented at the hearing, and to their experience. [62]

Q. And put down what they thought was fair?

A. That's right.

Q. Do you remember the basis upon which Mr. Baker arrived at his forty some per cent?

A. My recollection is that he distributed it—that he arrived at his percentage on the basis of the ratio with direct labor.

Q. Then, if I understand it, the appraisers considered that evidence, but did not go completely along with it?

A. No, we did not.

Q. It was just a matter of judgment?

A. Just a matter of judgment.

(Unreported discussion.)

(Thereupon an adjournment was taken until 2:00 o'clock p.m. on Wednesday, March 3rd, 1948, at the same place.) [63]

Offices of Messrs. Severson, Brown, Keough & McCallum, Room 1004, 605 Market Street, San Francisco, California,

Wednesday, March 3rd, 1948

2:00 o'Clock P.M.

(Pursuant to the foregoing adjournment, the deposition of the witness Anson Herrick at the above time and place was resumed, there being the same appearances as hereinbefore noted on page 28.)

ANSON HERRICK

recalled as a witness on behalf of the defendant, having been previously duly cautioned and sworn by the notary public to tell the truth, the whole truth, and nothing but the truth, testified as follows:

By Mr. Barnett:

Q. I am now looking at Mr. Baker's report—Mr. Levit can tell you the exhibit number; I can't.

Mr. Levit: Exhibit 3.

Q. (By Mr. Barnett, continuing): ——which is Exhibit 3, and the first page——

Mr. Levit: Which is not one of the great big wide pages, but just a sheet.

Q. (By Mr. Barnett, continuing): Right, that first sheet, which is a regular typewriting sheet, and it has four items here, "Excessive logging costs, 42,797.04; Grazing rentals, [64] 1,461.81; Log stain, 36,149.95; and Log Decking,

(Deposition of Anson Herrick.)

12,492.35." That is all in typewriting; but in ink, there is a bracket embracing those four figures, and set out in pencil it says \$25,000.00.

I understand that that is your own notation.

A. That's right.

Q. What does that mean, Mr. Herrick?

A. It means that the appraisers allowed \$25,000.00, a round amount, to cover all of the claims embraced within those four items. And I might point out, while it is not of importance, that the \$1,461.00 that you mentioned is a credit item.

Q. That is right. The parenthesis indicates that we had given credit against our original claim. It was one of those things we pointed out at the trial—at the hearing.

A. It is not important, Judge; but I don't remember that that came up. It may have been mentioned.

Q. All right. If you say it is not important, let it go; but I mean I haven't overlooked that that has the opposite effect of the other items.

A. That is right. Or, rather, in point of fact, the \$1,461.00 probably just wasn't even considered. The \$25,000.00 is more related to the excessive logging costs, the log stain and the log decking.

Q. Yes. Now, do you remember how you arrived at that \$25,000.00 figure? [65]

A. The result of long debate.

Q. Well, I will try to be more specific.

A. I can't give you anything beyond that, Judge.

(Deposition of Anson Herrick.)

Q. I don't deny that you answered my question, but it seems to me I still don't—

A. I can simply say that that was the result of the combined judgment of the appraisers.

Q. The excessive logging costs, \$42,797.04, is found in the proof of claim, isn't it?

A. That's right.

Q. And the insurance companies denied any liability for it at all? Let me look and see what they did about it.

A. I am not sure about it. Yes, they did.

Q. They denied any liability at all.

A. They denied any liability at all.

Q. And the excessive logging costs were figures that appeared on page 22 of the proof of claim, were they not?

A. Well, I don't remember the page number.

Q. I will show it to you.

(Document shown to witness.)

A. Yes, you are right.

Q. Page 22. Did the appraisers attempt to find out whether there was anything wrong in the figures used for making up that schedule, or was that accepted.

A. I think the appraisers accepted the figures as shown by the—on page 24, which was the basis for the computation of the claim on page 22. [66]

Q. On page 22. That is more accurate. They accepted the figures on page 24 which resulted in the calculation on page 22?

(Deposition of Anson Herrick.)

A. That's right.

Q. That is better. What was the point about it, then? How did it come about that all of these things were reduced to \$25,000.00?

A. Well, Judge, that is a difficult question to answer. I might say that it is almost an impossible question to answer directly. There were days and days of discussion and debate with respect to that and to many other things; and the \$25,000.00 was the final figure that was agreed upon as an allowance on account of all of these claims.

Q. But it was not on account of——

A. Inaccuracy of this? No.

Q. The question of the accuracy of the figures.

A. No.

Q. Now, as to the grazing rentals, as you have explained it, while the \$25,000.00 includes that, as a matter of fact it couldn't have been considered, because it wasn't a claim, it was a credit.

A. Yes, it was a credit.

Q. Now, on the log stain and the decking, and so forth, was there any evidence introduced at all as to the amount of that log stain that would have occurred within nine months?

A. Very complete evidence on the part of Mr. Moffett.

Q. Mr. Moffett was employed by the Western——

A. No, Mr. Moffett was a lumber inspector or surveyor.

Q. Yes, the timber engineer. And Mr. Moffett

(Deposition of Anson Herrick.)

was the man—who was the man that actually made the check—went out and checked to find out how much stain there was?

Mr. Levit: If you know, Mr. Herrick.

A. The tally was made by Mr. Moffett.

Q. (By Mr. Barnett): He was an employee of the Western Pine Association?

A. Mr. Moffett was an employee—he was—I think they called him lumber surveyor or lumber inspector of the Western Pine Association.

Q. Yes, that's right; but he only reported on the amount of it, didn't he?

Mr. Levit: Just a moment. I object to that question on the ground it is argumentative.

Mr. Barnett: All right.

Mr. Levit: And leading.

Q. (By Mr. Barnett): Do you know what part he took?

Mr. Levit: That question can be answered "Yes" or "No," Mr. Herrick.

Mr. Barnett: It can be after he refreshes his recollection.

A. Mr. Moffett testified that he had made a test run, or was present while this test run was made on these logs; the test taking place between November 1st and November 22nd, 1946; and that he then tallied and graded the lumber; and that he had kept control of the logs and the sawing and the grading; and [68] that the test comprised 239,000 board feet.

Mr. Levit: Mr. Herrick, were you reading from

(Deposition of Anson Herrick.)

notes in your file that you made at the time that the appraisers' hearings were held?

A. I was reading from my pencil notes.

Mr. Levit: Made at the time of the appraisers' hearing? A. Made at—contemporaneously.

Mr. Levit: Yes.

Q. (By Mr. Barnett): What about Mr. Thomas? What did he have to do with it?

A. Mr. Thomas testified that he had been employed by the Pickering Lumber Company to analyze the Moffett tally; that he was present during the Moffett work, and personally checked to determine that Moffett had taken a fair sample of the logs; and that upon the basis of the Moffett tally, he had estimated the deterioration which had taken place between July 7th, 1945, to April 7th, 1946, during a period of nine months, and also the deterioration which had taken place from April 7th, 1946, to July 7th, 1946; and the further deterioration that had taken place subsequent to November—subsequent to November 1st, 1946.

Q. What I am getting at is this: The log stain was estimated, the part that was claimed—instead of the part that Mr. Moffett found, only the part that was estimated to have occurred by Mr. Thomas—that is the part that is represented in the figure here? A. That is my recollection. [69]

Q. Did the appraisers come to the conclusion that the testimony was wrong, or was that what the trouble was? A. No.

(Deposition of Anson Herrick.)

Q. That was not the trouble?

A. That was not the trouble.

Q. Well, now, the log decking, \$12,492.35, as I understand it, that is the figure that Pickering claimed? A. That's right.

Q. And that is the figure shown by the figures that they had in their proof of claim?

A. That's right.

Q. Did the appraisers question the accuracy of the figures as to how much expense there was for log decking? A. No.

Q. That was not the trouble?

A. That was not the trouble. But that isn't quite proper to say that that was not the trouble. The question of the accuracy of the computation of those figures was not raised.

Q. All right. When I say that was not the trouble, the accuracy of the figures that I have just been talking about was not the thing that caused discussion for days? A. No.

Q. What was it that was the cause of the discussion?

A. The question as to the allowability of it at all.

Q. I notice that it all has to do—both the excessive logging costs and log decking and the log stain, all had to do with the logging operations.

A. That's right. [70]

Q. What did the appraisers decide about the logging operations?

A. That there should be an allowance of

(Deposition of Anson Herrick.)

\$25,000.00 on account of these claims. Now, Judge, there were days of argument on that point and varied points. And I think you can understand that I don't recall at this time—ten months after—all of the points that were argued.

Q. Yes, I do understand that. I am not blaming you.

A. I said I thought you could understand.

Q. Yes, I can understand it. Yes, I am still trying to find out as best I can—well, was the \$25,000.00 a figure that was arrived at by any kind of computation?

A. No.

Q. Was it arrived at by agreement?

A. Yes.

Q. Was there a dispute between the appraisers as to whether these things should be allowed at all or not?

A. Yes.

Q. Is that what resulted in the agreement?

A. Yes.

Q. Was it a compromise?

A. You might call it—yes, I think you would call it a compromise.

Mr. Levit: What page of your notes is that, please?

The Reporter: 184.

Mr. Barnett: Let me see where I am. I have got to get rid of you today; and I want to do it, whether I do a perfect job or not. [71]

Q. Notwithstanding the fact that, as you say, they treated the logging operations as a—it wasn't

(Deposition of Anson Herrick.)

treated as a part of the partial operation after the fire?

Mr. Levit: I didn't get the question.

A. Oh, yes, it was. It entered into the computation of the loss after the fire.

Mr. Levit: May I have that read back? I am sorry. I missed the first part of it.

(Record read as requested.)

Q. (By Mr. Barnett): It was treated as a part of the partial operations after the fire?

A. Yes.

Q. Do you remember, then, the theory upon which it was held that except the \$25,000.00 by agreement or compromise, it shouldn't be allowed—upon what theory it wasn't?

A. I think I can only answer that by explanation, Judge.

Q. That is what I expect.

A. The logging operations were considered as entering into the computation of the loss after the fire as a factor of recoverable overhead.

Q. I knew that. I knew that. But only to that extent? A. Only to that extent.

Mr. Barnett: I am not going to try to play this up by putting some leading questions, but it is only to relieve him of a long answer that is going to come out anyway.

Q. Was it your idea that a part of the cost after the fire went into logging, and they still had logs on

(Deposition of Anson Herrick.)

the way, [72] and for that reason they should absorb this cost? Was that the idea? I am not sure of it, but I just expect that.

A. Why, that is fundamental, Judge.

Q. Well, am I right?

A. Certainly, you are right on that.

Q. He is going to finally say it; so if I ask a leading question, it will save a lot of time. Otherwise he wouldn't know.

A. I think I can assure you, Mr. Levit, that leading questions isn't going to produce a different answer.

Q. I know that.

Mr. Levit: I know that. I just don't want to encourage it too much.

Mr. Barnett: It is a bad practice.

A. I think I was guilty on that during the hearing myself.

(Unreported discussion.)

Q. (By Mr. Barnett): But it was not considered a partial operation on the theory that any loss incident to it was to be balanced against any profit made by the box factory, am I right?

A. Read that question back.

(Question read by reporter.)

A. No.

Q. Well, explain it, then.

A. The three departments all were covered—or it was my understanding that it was recognized that

(Deposition of Anson Herrick.)

all of the three departments were covered by the policy; and consequently, all [73] three of them had to be taken into consideration; but there was no consideration of balancing one against the other.

Q. What I am getting at is this: I am necessarily going to be inartistic because of what I say, but you will have to bear with me while I am fumbling with the question; but what I am getting at is this: You didn't allow the log stain as depreciation, but you did allow depreciation on the box factory in assigning what profit was to be made by the box factory? A. That's right.

Q. And you treated both of them as partial operations? A. Yes.

Q. I am not criticizing. I am just asking to find out. Now, why did you allow the depreciation incident to the box factory to partial operation but not incident to the logging partial operation?

A. The so-called log stain was designated in the claim as depreciation; and if you will pardon me for saying so, Judge, that was not true. It was not a depreciation as the term is understood. It was a deterioration, which was not a continuing expense. If allowable, it would be what we call expediting expense. And if allowable as an expediting expense, would not have been controlled, in my opinion, by the co-insurance provision.

Mr. Barnett: Read that to me, please.

(Record read by reporter.)

(Deposition of Anson Herrick.)

Q. By the co-insurance provision, you are talking about [74] that section 4 that I read to you this morning?

A. Yes, the contribution.

Q. All right. I'm not making any point about that. I get mixed on the two. I just want to be sure that we understand each other. I understand what you say; but in the brief filed by the Pickering Lumber Corporation, it was claimed that that depreciation was also allowable, and it was part of the cost of partial operation in logging. Now, did you consider that claim?

A. That entered into the allowance of \$25,000.00.

Q. That was the part that you couldn't agree on, as to whether it was——

A. The two things: The excessive logging costs and the stain.

Q. And the decking?

A. And the decking.

Q. Three things, really.

A. Yes.

Q. I understand it now. As quick as I understand, I am ready to quit. I don't want to argue the matter.

A. Well, we are not arguing the matter.

Q. Well, I couldn't understand it.

(Unreported discussion.)

Q. (By Mr. Barnett): Handling these logs, while we are on logs, when you were allocating the total profits prevented, you didn't allocate any to logs; you allocated part to box factory and part to sawmill, but none to logs?

A. Well, there was no profit—no recovery—no

(Deposition of Anson Herrick.)

postfire [75] operation or profits in logs. The only factor was the recovery of overhead.

Q. Now, I think I understand what you mean when you say recovery of overhead, but I wish you would explain it; and I want to know that I do.

A. During the postfire operation, overhead naturally continued.

Q. That's right.

A. A portion of that overhead was applicable to logging operations, and a portion to box factory operations. It was presumed that the logs which were produced had a value at least equal to their cost, including the overhead, so that——

Q. Wait a minute. I will put this in. And we still have the logs?

A. And you still have the logs.

Q. All right.

A. In other words, the overhead, which has been charged to logs, was recovered through an existence of an equal value in the logs, but without profit.

Q. That is what I thought you meant, but I wondered whether I understood it.

While we are on logs, do you remember the evidence showed that when the fire occurred there were certain logs already felled but in the woods; and that other logs were felled afterwards?

A. I recall that generally, yes.

Q. Was there a distinction in the handling of the logs in that situation on account of that fact?

A. No.

Q. Logs felled before and after the fire?

(Deposition of Anson Herrick.)

A. No. [76]

Q. You didn't think there would. I couldn't find out, but I didn't know.

Do you remember that there was evidence to the effect that within a very short time—I think about five days after the fire—Pickering got word that they could get enough machinery to get at least one side of the double-deck mill running in less than nine months? A. Yes.

Q. And that they immediately began bringing in the logs?

A. Yes. Well, just a moment. I don't remember that there was testimony that immediately upon that——

Q. All right.

A. (Continuing): ——they started to bring in the logs.

Q. All right.

A. But I know the testimony was to the effect that the logging operations were continued.

Q. After getting evidence from Filer and Stowel that they could get one side of the mill in operation within less than nine months?

A. Well, my recollection is this: That their testimony was to the effect that they could get the mill—or, that is, that they thought that they could get the mill running within nine months; so one of the factors was that it resulted in the continuation of the logging operations.

Q. There was evidence that Filer and Stowel had a strike, and that didn't materialize?

(Deposition of Anson Herriek.)

A. I believe there was. [77]

Q. And there was evidence that after that they didn't get it, and that they didn't bring in any more logs?

A. I don't recall that. It may be correct.

Q. Did the appraisers question that testimony?

A. No.

Q. That had nothing to do with the finding?

A. No.

Q. Did the appraisers have any question about the good faith of the logging?

A. No. I might supplement that by saying that the question of good faith of the Pickering Lumber Corporation never entered into consideration.

Q. I didn't think so, but I was going to ask you that. I thought it might.

A. On the part of no one of the appraisers or the umpire.

Q. You never said it before, but I always thought that if it did, you would have been sterner when you saw us after that.

Now, on the box factory, if I remember what you said this morning, in arriving at the profit on the lumber coming from the sawmill, you arrived at it by taking the cost of the timber to Pickering and adding to it all the costs that they incurred in converting it into lumber. A. Yes.

Q. You didn't do it that way for the box factory, did you? How did you arrive at the profit for the box factory?

(Deposition of Anson Herrick.)

A. The profit for the box factory was arrived at by taking the constructed market price for the lumber that was [78] converted into shook, and the expenses of operating the box factory, and deducting the aggregate from the proceeds of the shipments.

Q. While I consider your answer technically and completely accurate, Mr. Herrick, it is not informative about something that is not too familiar to us. Explain to us what "constructive market price" was?

A. The constructed market price was the so-called legal price at which the lumber could have been sold—that is, the lumber which was converted into—through the box factory—could have been sold as lumber, plus the most advantageous freight differential.

Q. Which, by the way, was a part of the OPA price, wasn't it?

A. No. The OPA prices were on a basing point of Susanville; and there was added to the OPA the freight from Susanville to the point of destination, less the actual freight from Standard to the point of destination.

Q. I understand that; but what I was getting at—I didn't express myself accurately—if they had sold under OPA, they would have been permitted to sell it that way, wouldn't they? A. Yes.

Q. In other words, the OPA prices being based at Susanville, if you could sell at prices where the

(Deposition of Anson Herrick.)

freight was less than that, you actually could make that freight differential by selling under the OPA?

A. Yes. [79]

Q. That is the reason you put it in?

A. That is right. That is the reason.

Q. In other words, you took the OPA price, the way they actually operated if you sold under their price, rather than as an abstraction?

A. The constructed market price which was used was based on the sale—I think for half of the quantity at Modesto or Merced delivery, at which point it would have given the company the greatest return; and the other half at Fresno, which gave it a little less return, and it was averaged out.

Q. And the reason you took that was because that was the best you could do? A. Yes.

Q. Not having been actually sold there, wasn't the charge then varied; and you tried to do it on some reasonable basis? A. That's right.

Q. All right. Now, there was testimony given before you—and when I say testimony, I am not talking about sworn testimony——

A. I understand that.

Q. Witnesses got up and told you—they were not required to be sworn—to the effect that the OPA prices on a very great portion of the lumber that went through the box factory was below cost. Do you remember that?

A. I don't remember testimony specifically to that point or upon that point, but it was completely

(Deposition of Anson Herrick.)

recognized that the OPA prices on the quality and the grade of lumber that went through the box factory was less than the average cost of all [80] lumber produced.

Q. Do you remember that there was evidence to the effect that Pickering couldn't have bought the lumber that went to the box factory at the OPA ceiling prices? A. Yes.

Q. Did the appraisers question that testimony?

A. No. Not only did the appraisers not question it, but it was within their general knowledge.

Q. They knew that was the fact? A. Yes.

Q. That it couldn't be bought at that price?

A. Yes.

Q. Then you didn't take OPA prices on the theory that Pickering could have actually paid that?

A. Yes, that is right.

Q. You only considered it in the light that they would not have been able to sell it at any higher price? A. That's right.

Q. If they had sold, that would have had to be out on the market? A. That's right.

Q. The appraisers didn't find that there was any actual market in the sense of actual open sales and purchases at other than OPA prices?

A. Well, I don't think they found that because—it may have been that there were some sales of lumber made at those prices.

Q. You didn't have any testimony before you to that effect? A. Not that I recall.

(Deposition of Anson Herrick.)

Q. All right. I am trying to find the basis of why you [81] found——. Then explain to me why you used OPA selling prices.

A. Because those were the only prices of which we had knowledge at which the lumber could have been sold as lumber.

Q. In the absence of any actual active market, you couldn't find any other figure, do you mean?

A. Couldn't find any other figure to tie to or, upon which there could be agreement among the appraisers.

Q. In other words, you could think of something, but you couldn't get together?

A. Nothing to tie it to.

Q. All right. I am asking you simply to keep straight. Reputable men offhand say things and mean them, and on further investigation, on looking into it, they remember more than they had in mind when they said it. And Mr. Lilly was under the impression offhand that he wasn't consulted, and that he didn't have to pass an opinion on this matter when he acted as umpire.

A. What?

Q. Mr. Lilly made a statement that he didn't know anything about this, because he wasn't called upon to pass on anything as umpire, because there was no agreement. Is that correct? Is that according to your recollection?

A. I don't quite understand the question.

Q. I will leave out what Mr. Lilly says. That has nothing to do with it. [82]

(Deposition of Anson Herrick.)

Were the appraisers on all points able to get together, or did they have to leave some things to be decided by the umpire?

A. Why, the very fact that the umpire was called in must be evidence that his decisions were necessary.

Q. It does; but I wasn't sure that he was called in. I am asking you about it.

A. Well, I think it was well known.

Q. No, I don't. I am in ignorance about the matter. I just want the facts.

Mr. Levit: If he wasn't, then why did he sign the award, if the appraisers had agreed?

Mr. Barnett: I would rather have the facts than to deduce it. It has been deduced a long time, but I want to find out how it was this time.

A. I have forgotten how many days of conference there were between the appraisers before Mr. Lilly was called in; but Mr. Lilly was called in to assist in reaching an agreement.

Q. Do you remember how many items were submitted to him? We are going to take his deposition, but I want your recollection before we take his deposition.

A. I wouldn't want to say how many.

Q. Do you remember any of them?

A. Frankly, it seems to me, Judge, that is a matter which involves the various considerations of the appraisers, which I shouldn't answer. [83]

Q. Well, if I have asked you anything improper,

(Deposition of Anson Herrick.)

I don't want to; but I don't understand why. Mr. Lilly hasn't done anything he thought is wrong.

A. Absolutely not.

Q. And if his memory is refreshed that he——. I am trying to be as helpful to everybody to get this actually as it was.

A. The principal point upon which Mr. Lilly assisted in reaching a consensus was the determination of the box factory prices.

Q. As to whether OPA selling prices should be added?

A. As to what valuation should be placed upon the lumber.

Q. That was the principal one. Do you remember any others?

A. The general matter of logging overhead and logging costs.

Q. And as to whether it was an insurable loss at all or not?

A. No, I don't think that was a question.

Q. What was it, if you remember?

A. There were two questions involved in that: One was the percentage of overhead applicable to the logging.

Q. Which this morning you said you used your judgment.

A. Our combined judgment. And the amount of allowable on account of stain and excess logging costs.

Mr. Levit: What was that second?

(Deposition of Anson Herrick.)

Mr. Barnett: The amount allowable on account of excess logging costs. That was the matter of the \$25,000.00.

Let me speak to my two associates. I think I am through. [84]

(Unreported discussion.)

Mr. Barnett: Well, that is.

By Mr. Levit:

Q. Mr. Herrick, it is correct, is it not, that in connection with all of these matters on which you have testified in response to Judge Barnett's questions, and which entered into the computation of the loss, it was necessary for you and the other appraiser and the umpire to exercise your judgment in arriving at a conclusion, was it not?

A. Correct.

Q. And I take it that you, speaking for yourself, did exercise your judgment in connection with each of those matters? A. I did.

Q. Mr. Herrick, before commencing this appraisal, you and Mr. Maloney had been appointed to act as appraisers—you by the insured, Pickering Lumber Corporation, and Mr. Maloney by the insurers, is that correct? A. That is correct.

Q. And before starting on the appraisal, you and Mr. Maloney agreed upon Mr. Lilly as the umpire?

A. Correct.

(Deposition of Anson Herrick.)

Q. As a matter of fact, it was you, was it not, who suggested the name of Mr. Lilly as umpire?

A. Yes.

Q. I believe you wrote a letter, did you not, to Mr. Maloney, in which you gave him three names as possible umpires [85] who would be satisfactory to you?

A. I think I did. In fact, I am sure of it. I don't recall the three names; but I do recall that Mr. Lilly was at the top of the list.

Q. Mr. Herrick, you recall now, do you, that you suggested Mr. Lewis Lilly as your first choice, Mr. Addison Strong, of Hood and Strong, as your second, and Mr. Rollin P. Rodolph, of Rollin P. Rodolph Company, as your third choice?

A. Right.

Q. Those firms are all certified public accounting firms, are they not? A. Right.

Q. Did Mr. Maloney suggest any umpires?

A. Yes.

Q. Were there any common names on your respective lists? A. No.

Q. So that the selection of Mr. Lilly was a selection of the—of one of the three chosen by you? A. Right.

Q. It is a fact, is it not, Mr. Herrick, that in the conduct of this appraisal it was necessary that some one of the three of you—I am referring now—I will use the generic term of appraiser rather than umpire in mentioning them.

(Deposition of Anson Herrick.)

A. That is all right.

Mr. Barnett: They can be understood as being appraisers unless otherwise designated.

Q. (By Mr. Levit): It was necessary as a practical matter for one of the appraisers to take the lead in analyzing these figures and analyzing the points of agreement and disagreement [86] among you, and analyzing the various possibilities and contentions, was it not? A. Right.

Q. And it is a fact, is it not, Mr. Herrick, that you actually took the lead in those matters?

A. That's right.

Q. That was true during the entire time of the appraisal, and up to and including the time of the award, was it not? A. That's right.

Q. That was done, I take it, with the full consent and approval of the other two appraisers?

A. Right.

Q. It is a fact, too, is it not, that in an appraisal of the size and complexity of the one here involved, there were necessarily many points that had to be discussed at considerable length and written out?

A. Right.

Q. And someone had to take the initiative in framing and bringing together the varying viewpoints? A. Right.

Q. And in this case and during this proceeding, you took that initiative, did you not, largely?

A. Yes, at least up to the point of the umpire being brought in.

(Deposition of Anson Herrick.)

Q. Yes. Now, in your computation which has been introduced in the course of this deposition as Exhibit No. 7, you refer on page 1 to a letter of May 14th, 1947, to Barnett. You recall that?

A. Yes.

Q. Was that a letter which you wrote to Mr. Barnett? A. Yes.

Q. And you have that letter? [87]

A. Yes; and that is the letter of which you asked me to prepare a copy; and it has not been prepared merely because my stenographic department didn't have the time to do it.

Q. What was the occasion for the writing of that letter, Mr. Herrick?

A. Shortly following the award, Judge Barnett called upon me and asked me for a brief statement with respect to the composition of the award.

Q. And in response to that request, you wrote the letter to him of May 14th, 1947? A. I did.

Mr. Levit: We should like to offer that letter in evidence, and ask that it be marked as Exhibit A of the plaintiffs.

Mr. Barnett: No objection.

Q. (By Mr. Levit): And I assume, then, Mr. Herrick, that you will furnish a copy to the reporter and a copy to me? A. You say Exhibit A?

Q. Exhibit A.

Mr. Barnett: Is that the one—when I went to you, and you told me—I couldn't follow what you said then—and said to write a letter and tell me

(Deposition of Anson Herrick.)

about it, and you wrote to me. I was in San Francisco at the time. Is that the one?

A. Yes, that is the one.

Mr. Barnett: Yes, I remember that. I was here, and I asked you to write me what you had told me at the time. A. Yes. [88]

Q. (By Mr. Levit): Now, Mr. Herrick, did you have any other correspondence, or did you exchange any other written documents with Mr. Barnett or with the Pickering Lumber Company, or with any of the officers or principals of the Pickering Lumber Company after the award was made, in addition to this letter of May 14th, 1947, and the computation which has been introduced here in evidence as Defendant's Exhibit 7? A. No.

Q. You haven't written any other letter?

Mr. Barnett: Do you mean at any time?

Mr. Levit: At any time since the award was signed.

Q. (By Mr. Barnett): In the last three days, Mr. Herrick, a letter was delivered here.

A. Oh, yes.

Mr. Barnett: Yes, a letter was delivered here yesterday.

A. Yes.

Mr. Levit: Do you have a copy of that letter?

A. No.

Mr. Barnett: I have.

Mr. Levit: Do you have it? May I see it?

Mr. Barnett: Let me find it for you.

Mr. Brown: I have it right here.

(Deposition of Anson Herrick.)

Mr. Barnett: You have it?

A. I gave you two copies of that.

Mr. Brown: Yes, you did.

Mr. Barnett: He said at any time. That means up to today.

A. I completely overlooked that. I had tried to think of [89] something I had written to the company or to you aside from this.

Mr. Barnett: Well, it is all right.

A. I don't think there was anything——

Mr. Barnett: No, that is all right.

(Unreported discussion.)

Q. (By Mr. Levit): Mr. Herrick, I show you what purports to be a copy of a letter addressed to Judge Barnett on your letterhead dated March 1st, 1948, and ask you if this is the letter which you wrote and sent to Judge Barnett.

(Document shown to witness.)

A. That's right.

Mr. Brown: We will stipulate it is.

Mr. Levit: We offer that in evidence, and ask that it be marked Exhibit B. No objection to the copy instead of the original?

Mr. Barnett: No, I don't care. We are just trying to find out what happened.

(Carbon copy of letter on letterhead of Lester Herrick and Herrick, from Anson Herrick to Judge Paul V. Barnett, dated March 1st, 1948, marked "Plaintiffs' Exhibit B.")

(Deposition of Anson Herrick.)

Q. (By Mr. Levit): Mr. Herrick, you referred to the fact that during the conduct of the hearings on the appraisal you took certain pencil notations on the testimony that was given. A. I did.

Q. And you subsequently prepared a document which was [90] typed, headed "Notes relating to the hearing of the matter by the appraisers," did you not? A. That's right.

Q. Is that a transcript of your penciled notes?

A. No, this is a dictation from my penciled notes.

Q. Would you say that, looking at it fairly, it contains the substance of all of the material in your notes? A. That was my intention.

Q. And as far as you know, that is the fact, is it not? A. That's correct.

Q. All right. Do you have the typewritten summary that you prepared of those hearings?

A. Yes.

Q. May I ask that it be produced and marked.

A. Yes, it is here.

(Unreported discussion.)

Mr. Levit: I have it here; and I will be glad to furnish this copy, if you will identify it, to the reporter, and he can then copy it for the purpose of the deposition without the penciled notations that are on it.

Mr. Barnett: You put the pencil notations on it yourself?

(Deposition of Anson Herrick.)

Mr. Levit: I don't know who put them on. I didn't.

Mr. Barnett: They weren't put on by Mr. Herrick.

Mr. Levit: He told us that.

A. No, they weren't. They were unquestionably put on by Mr. Maloney.

Mr. Levit: I will offer that document, after you have identified it, Mr. Herrick, as Exhibit C. [91]

A. Correct.

Mr. Barnett: If Mr. Maloney put some pencil notations on it, I would like the whole thing to go in with his explanation, because when we come to Mr. Maloney we will ask him about it.

Mr. Levit: I will have the document here, in any event; and I have no particular objection to having Mr. Brown's go in as the original exhibit, except for the fact that it would require photostating to reproduce it. I will endeavor to have it here when you are examining Mr. Maloney; but I would suggest, if it is agreeable, that for the purpose of the record the reporter be instructed to make a copy of that, and attach it to the original and to the other depositions.

Mr. Barnett: Without the pencil notations.

Mr. Levit: Without the pencil notations.

Mr. Barnett: I have no objection; but we are going to have to finally find out whether they are of any significance or not.

(Deposition of Anson Herrick.)

The Witness: I just looked over them and they are of no significance.

Mr. Levit: I am quite sure they are not. They appear to be mostly rings around various portions; and so, therefore, if it is agreeable, I will undertake to have this here at any time that you wish to examine it; and the reporter will copy Exhibit C for attachment to both the original and the copies of the depositions.

Mr. Barnett: Very well; and we will ask you when we take [92] Mr. Maloney's deposition to have that present.

(Document headed "In re Pickering Lumber Corporation Business Interruption Loss Insurance Claim, Notes relating to the hearing of the matter by the Appraisers," marked "Plaintiffs' Exhibit C.")

Q. (By Mr. Levit): Mr. Herrick, did you prepare a draft memorandum of the procedure to be followed in the conduct of the hearings, do you recall? A. Yes, I do.

Q. I show you what purports to be such a document, and ask you if you prepared that in advance of the holding of the hearings?

A. I have to read it, because I have forgotten all about it.

Mr. Barnett: He did in fact read such a thing at the hearing; and asked if all of us were content with it.

(Deposition of Anson Herrick.)

Mr. Levit: Yes.

A. Yes.

Mr. Levit: Were copies of this draft furnished to and accepted by the other two appraisers?

A. I think I furnished a copy of it to Mr. Maloney; but I am quite uncertain whether I furnished a copy to Mr. Lilly.

Mr. Barnett: I will state this off the record.

(Unreported discussion.)

Q. (By Mr. Levit): Do you recall at the commencement of the first hearing that was held on the appraisal, that you read this draft memorandum in the presence of the representatives of [93] Pickering Lumber Corporation and also of the insurers, and asked if either of them had any objections to it?

A. Yes, I did.

Q. And did either of them have any objections, or express any?

A. There were no objections. There is a reference to that in the memorandum of the hearings. In fact, there is my pencil memorandum that I made—that I read that statement.

Mr. Barnett: In view of the fact that the memorandum was made at the time, which coincides with my memory, it must be right.

Mr. Levit: Which, your memory or the memorandum?

Mr. Barnett: The memorandum must be right.

A. I had completely forgotten all about it.

Q. (By Mr. Levit): Mention was made this

(Deposition of Anson Herrick.)

morning, Mr. Herrick, by Judge Barnett of the fact that the witness or testimony taken was not taken under oath. Do you recall that?

A. I recall that.

Q. Was any objection raised by either party at the hearing to the informal method of procedure that you followed in permitting the testimony to be taken without oath?

A. No objection was raised. I have forgotten whether or not the question of swearing the witnesses was raised. I have a very indistinct recollection that it was; and that it was agreed that placing them under oath was not necessary.

Q. It is true, is it not—— [94]

A. Frankly, my recollection is not clear.

Q. It is true, is it not, that had either party requested or insisted that oaths be administered, you would have so proceeded? A. Certainly.

Mr. Levit: I think we will offer the draft memorandum of procedure to which I have referred to in evidence as Exhibit D.

(Said document entitled in part “Draft Memorandum of Procedure to be Followed in the Conduct of the Hearing,” marked “Plaintiffs’ Exhibit D.”)

Q. (By Mr. Levit): Mr. Herrick, did the appraisers in the hearing allow both parties to this appraisal to present all of the testimony that they wished to, both in oral and written form?

(Deposition of Anson Herrick.)

A. Yes.

Q. And was there any testimony of any kind that was offered rejected by the appraisers, or refused to be heard? A. No.

Q. In fact, it is true, is it not, that after the appraisal hearings were completed, the appraisers found it necessary or thought it advisable, at least, to request certain additional information from the parties; and that was done; and that information was furnished, is that correct?

A. That is correct.

Q. And it is true that no evidence or testimony or documentary proof of any kind was declined?

A. Right. [95]

Q. You mentioned Robinson, Nowell & Co. They are certified public accountants, are they not?

A. Right.

Q. And they appeared in this proceeding on behalf of Pickering Lumber Corporation?

A. Right.

Q. Mention was made of the fact that the appraisers made no independent examination of the books and original records of the Pickering Lumber Corporation. Was there any request that they do so made by either party to this proceeding?

A. I recall none.

Mr. Barnett: There wasn't any.

Q. (By Mr. Levit): Is it your recollection that it was agreed to by both parties that the data which was in the possession of the appraisers in the form

(Deposition of Anson Herrick.)

of the original claim and the various analyses by accountants on both sides, the testimony and other information given, was all that was necessary for the appraisers to consider in reaching their award?

A. Right.

Mr. Barnett: And I think it was.

A. There never was any question.

Mr. Barnett: No, nobody ever claimed that there was anything else required. Don't take this.

(Unreported discussion.)

Q. (By Mr. Levit): Mr. Herrick, I show you what purports to be a copy of a paper headed "Memorandum of general considerations relating to the settlement of the Pickering Lumber Corporation business interruption loss claim," which is dated [96] May 2nd, 1947, and which bears at the end no signature, but the initials "AH:AG"; and I will ask you if you dictated or wrote that memorandum on or about the date it bears?

Mr. Barnett: Let me have time to read this.

A. Yes, I did.

Mr. Barnett: Will you?

Mr. Levit: Surely.

Mr. Barnett: I have never seen this. We can't stop to analyze it now.

A. What is the date of it? May 2nd?

Q. (By Mr. Levit): Yes. Will you just see if that is a correct copy of that.

A. Just a minute. There is—I think I should

(Deposition of Anson Herrick.)

make some correction on here which I made in my copy afterwards. Where did you get that?

Q. I can't answer that. I found that copies in the papers that were furnished to me by the—within the last few weeks by the Fire Companies' Adjustment Bureau.

A. It must have been that Maloney turned that over.

Q. Well, that is possible.

A. Because that—that I frankly looked upon as a confidential matter among the appraisers.

Q. Well, now——

A. On the other hand, there was no secrecy, you see; but it is merely part of our deliberations.

Q. Let me ask you this, Mr. Herrick: This memorandum is [97] dated May 2nd, 1947. Do you recall whether you prepared it before or after the award was signed? A. Oh, before.

Q. The award was signed?

A. Wait a minute. Wait a minute. When was the award signed?

Mr. Brown: Here is the award here.

Mr. Levit: I have a photostatic copy of it.

Q. I will show you a photostatic copy of the award, Mr. Herrick, in order to refresh your recollection on that.

A. Well, this was finally completed on May 3rd.

Q. At any rate, we can say now, can't we, that this memorandum dated May 2nd was prepared by you at or about the time the award was in the

(Deposition of Anson Herrick.)

process of being signed? A. That's right.

Q. And did you furnish copies of this memorandum to Mr. Maloney and to Mr. Lilly?

A. I gave copies to Mr. Lilly and to Mr. Maloney.

Mr. Levit: We offer this memorandum in evidence as Plaintiffs' Exhibit E.

(Said memorandum consisting of three pages, dated May 2nd, 1947, marked "Plaintiffs' Exhibit E.")

Mr. Levit: For the purpose of the record, I will state that the pencil, or, rather, the pen and ink corrections or changes which appear on this typewritten Exhibit E were just made by you, Mr. Herrick, pursuant to changes which I assume you have found in your file copy. A. That's right. [98]

Q. Do you recall when those changes were made by you with reference to the time of the making of the award? A. No.

Mr. Barnett: Just let me ask this:

Q. Do they amount to anything? Do they change the sense of it? A. No.

Mr. Levit: I haven't paid particular attention to them. I don't think they do.

A. No, just little changes in phraseology.

Mr. Barnett: I know. Just prettying up your own language a little bit.

The Witness: I beg your pardon?

Mr. Barnett: Just prettying up your own language a little bit? A. Right.

(Deposition of Anson Herrick.)

Mr. Barnett: I always do, too.

Q. (By Mr. Levit): Mr. Herrick, I am going to hand you a three-page statement relating to the Pickering Lumber Corporation, and typewritten, and ask you if you can identify that, as to who made it and about when it was prepared.

A. I prepared it shortly after being appointed as appraiser, for the purpose of determining the detailed position of the differences between the insured's claim and the insurers' computation.

Q. Can you tell me whether or not this document was prepared by you before or after the hearings themselves were started? A. Before. [99]

Q. Before they started?

A. Wait a minute. Wait a minute. Let me see this. No, after.

Q. After the hearings started?

A. After the hearings, because effect is given to the errors which were brought out—which at the hearings were brought out, and had to be made in the insured's claims, 953, not 753.

Mr. Barnett: That is all right. There was something like that. I know.

Q. (By Mr. Levit): When you speak of those errors that were made in the insured's claim, I take it that you mean that they were errors that the insured conceded at the hearing?

A. And they were very small.

Mr. Barnett: Made by counsel.

Q. (By Mr. Levit): Were copies of this, do

(Deposition of Anson Herrick.)

you recall, furnished to the parties and to the other appraisers?

A. Copies were furnished to the other appraisers; but I—I don't recall. I don't recall.

Mr. Barnett: They were not. I never saw it before.

Mr. Levit: We will——

Mr. Barnett: But I haven't objected to it.

A. It was a document prepared for the convenience of the appraisers.

Q. (By Mr. Levit): Yes. And, of course, while you probably don't recall the exact date of preparation, it is true, is it [100] not, that it was prepared a considerable period of time before the actual award was arrived at?

A. It was prepared prior to the commencement of consideration between the two appraisers.

Q. Which would have been shortly after the hearings were held?

A. Shortly after the hearings were held.

Mr. Levit: We will offer this in evidence, and ask that it be marked Exhibit F; and my suggestion would be, Mr. Hart, that this be photostated.

(Said statement consisting of three pages of typewritten matter bound in blue cover marked "Plaintiffs' Exhibit F.")

Q. (By Mr. Levit): Mr. Herrick, did you, and to your knowledge, the other appraisers, give careful and full consideration to all of the evidence, both

(Deposition of Anson Herrick.)

oral and documentary, that was produced, and to all of the contentions made on the various points in dispute by both sides before arriving at your award?

A. That was our intention; and it was believed that we did.

Q. You believed that you did? A. Yes.

Q. And you believe that the others did also, do you not? A. I can't speak for them.

Q. Well, can you express any opinion on the subject? A. Yes, my opinion is that they did.

Mr. Levit: I think that is about all.

Mr. Barnett: That is all.

/s/ ANSON HERRICK. [101]

United States of America,
Northern District of California,
City and County of San Francisco—ss.

I hereby certify that on the 28th day of August, 1947, at 9:30 o'clock a.m., before me, Louis Wiener, a Notary Public in and for the City and County of San Francisco, State of California, at the offices of Messrs. Severson, Brown, Keough & McCallum, Room 1004, 605 Market Street, San Francisco, California, personally appeared, pursuant to Notice of Taking Deposition, Anson Herrick, a witness called on behalf of the defendant herein; and Messrs. Long & Levit, represented by Bert W. Levit, Esquire, and David C. Bogert, Esquire, appeared as attorneys for the plaintiffs; and Messrs. Severson,

Brown, Keough & McCallum, represented by Harold Clinton Brown, Esquire, and Messrs. Watson, Ess, Barnett, Whittaker & Marshall, represented by Paul Barnett, Esquire, appeared as attorneys for the defendant; and the said Anson Herrick being by me first duly cautioned and sworn to testify the whole truth, and being carefully examined, deposed and said as appears by his deposition hereto annexed.

And I further certify that the said deposition was then and there recorded stenographically by Frank L. Hart and Harold H. Hart, competent official and disinterested shorthand reporters, appointed by me for that purpose and acting under my direction and personal supervision, and was transcribed by them.

And I further certify that at the conclusion of the taking [145] of said deposition, and when the testimony of said witness was fully transcribed, said deposition was submitted to and read by said witness and thereupon signed by him in my presence, and that the deposition is a true record of the testimony given by said witness.

And I further certify that the exhibits hereto attached and marked Defendant's Exhibits Nos. 1 to 7, inclusive, and Plaintiffs' Exhibits A to F, inclusive, respectively, are the exhibits referred to and used in connection with the deposition of said witness.

And I further certify that the said deposition has been retained by me for the purpose of securely

sealing it in an envelope and directing the same to the Clerk of the Court as required by law.

And I further certify that I am not of counsel or attorney for either or any of the parties, nor am I interested in the event of the cause; I further certify that I am not a relative or employee of or attorney or counsel for either or any of the parties, nor a relative or employee of such attorney or counsel, nor financially interested in the action.

In Testimony Whereof, I have hereunto set my hand and official seal at San Francisco, California, this 20th day of April, A.D. 1948.

[Seal] /s/ LOUIS WIENER,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed D.C. March 17, 1948.

[Endorsed]: Filed C.C.A. March 9, 1950. [146]

In the District Court of the United States for
the Northern District of California, Southern
Division

No. 27,299-H

THE AMERICAN INSURANCE COMPANY, et
al., all corporations,

Plaintiffs,

vs.

PICKERING LUMBER CORPORATION, a cor-
poration,

Defendant.

DEPOSITION OF LEWIS LILLY

Be It Remembered, that on Friday, the 9th day of
April, 1948, at 2:30 o'clock p.m., pursuant to stipu-
lation between counsel for the respective parties, at
the office of Messrs. Severson, Brown, Keough &
McCallum, 605 Market Street, Room 1004, San
Francisco, California, personally appeared before
me, Louis Wiener, a Notary Public in and for the
City and County of San Francisco, State of Cali-
fornia,

LEWIS LILLY

a witness called on behalf of the defendant herein.

Messrs. Long & Levit, represented by Bert W.
Levit, Esquire, appeared as attorneys for the plain-
tiffs; and Messrs. Severson, Brown, Keough & Mc-
Callum, represented by Harold Clinton Brown,
Esquire, and Messrs. Watson, Ess, Barnett, Whit-

(Deposition of Lewis Lilly.)

taker & Marshall, represented by Paul Barnett, Esquire, [1*] appeared as attorneys for the defendant.

The said witness having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the above-entitled cause, did thereupon depose and say as hereinafter set forth.

It was stipulated between counsel for the respective parties that the notary public, after administering the oath to the witness, need not remain further during the taking of this deposition.

It was further stipulated that the said deposition should be recorded stenographically by Harold H. Hart, a competent official shorthand reporter and a disinterested person, and thereafter transcribed by him into longhand typewriting, to be read to or by the said witness, who, after making such corrections therein as may be necessary, will subscribe the same.

It was further stipulated that all objections to questions propounded to the said witness shall be reserved by each of the parties, save and except any objections as to the form of the questions propounded. [2]

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

LEWIS LILLY

called as a witness on behalf of the defendant, being first duly cautioned and sworn by the notary public to tell the truth, the whole truth, and nothing but the truth, testified as follows:

By Mr. Barnett:

Q. Mr. Lilly, this is a continuation of a deposition in the case of The American Insurance Company and others against Pickering Lumber Corporation, No. 27,299-H, what was begun on the 20th day of August, 1947, at which time you were sworn as a witness; and this is a mere continuation of that deposition.

A. I see. Well, you know the date. I haven't any record of it.

Q. I was just referring to it.

A. You have the record there.

Q. Mr. Lilly, were you the umpire chosen by Mr. Anson Herrick and Mr. Maloney to appraise the loss under the use and occupancy insurance policies which were presented under the proof of claim of the Pickering Lumber Corporation?

A. I was.

Q. Do you remember the first meeting of the appraisers and the umpire?

A. In all fairness, not particularly.

Q. All right. I am glad to refresh your recollection. [3] Do you remember that you sat with

(Deposition of Lewis Lilly.)

the two appraisers when the parties were permitted to come before you and to present their claims and their evidence? A. Yes.

Q. Do you remember that?

A. I remember that.

Q. Do you know where it occurred?

A. As I recall, in the office of Orrick, et al.

Q. In the Financial Center Building, in San Francisco?

A. In the Financial Center Building.

Q. All right. Now, later the appraisers made an award, and sent it to you, and you signed with them? Do you remember that?

A. I remember signing the award.

Q. Now, being the umpire, I assume that you did not take part in arriving at the decision unless you were called upon to do so by the appraisers? Is that right?

A. Substantially, yes; but let me qualify that answer by saying that at the start certain, shall we say proceedings, were held in my—were held in my office. Now, I don't remember which ones specifically, but there were matters that came up; and some of them were discussed about which there had been no difference of opinion as between the two different appraisers.

Q. In other words, you were a member of the board, and you were in their confidence; and there was no reason to keep any secrets from you?

A. I assume that to be true, sir.

(Deposition of Lewis Lilly.)

Q. They did have some differences that were submitted [4] to you?

A. Yes, as I recall, there were possibly one or two differences.

Q. Do you remember what they were?

A. May I just refer to a memorandum here?

Q. Any way that will be the easiest for you, Mr. Lilly.

A. Because I have no record of it. I think specifically that one of the questions submitted was the value of the lumber coming into the box mill. Let me say for the record, I have not seen this record, nor have I consulted anyone in any way since I was telephoned by Mr. Brown the other day; and I am speaking of my memory.

Q. Let me state this: I am not trying to catch you; and I want to say this: If there is anything I have that may help you, that you want to look at, you can see anything I have if it will be of help.

A. No. Well, all right. But I mean I want to say that I am being hesitant only in so far as my memory——

Q. Requires?

A. Well, my memory permits. And I think there was the one question there that had to do with the value of the material going into the box mill; and I think the other one had to do with the stumpage, the price of stumpage.

Q. Do you remember what the difference of opin-

(Deposition of Lewis Lilly.)

ion was on the cost of lumber going into the box factory?

A. You mean as to the exact figure, sir?

Q. No. A. No, I don't. [5]

Q. In principle, what was the difference between them?

A. In principle, the question was as to whether the value as—I think I am stating this correctly—the value as asserted by the company should be used, or whether the value should be determined by the OPA market price plus their freight differential. Now, that is as I recall it.

Q. Well, now, I am not trying to get you to give an answer. A. No.

Q. I am just telling you this. Mr. Maloney suggested that he disagreed with Mr. Herrick as to whether or not the freight—the freight differential should be considered in the OPA ceiling price. Do you remember anything about that?

A. Yes. As I recall it, there had been some differences of opinion as to that; and, as I recall, there was a differential finally arrived at.

Q. Who decided that?

A. Well, I suppose—as near as I can recall, perhaps I had to decide it.

Q. You were the one that decided on the freight differential?

A. Well, let me put it—whether I decided or not, I at least had a view on the subject.

(Deposition of Lewis Lilly.)

Q. You don't know whether you outvoted him two to one, or you decided that?

A. No, I wouldn't say. At least, there was an agreement on it at the finish. [6]

Q. (By Mr. Levit): Among all three of you?

A. Yes. Oh, yes, the three of us.

Q. (By Mr. Barnett): That was on the price of lumber going to the box factory. The other was the price of stumpage. By "stumpage," I understand you to mean standing lumber?

A. In the normally accepted sense of the word, yes.

Q. I am trying to put it simply. A. Yes.

Q. Do you remember what that disagreement was?

A. No, I am not so clear. I am not clear as to that. As I recall, we—it rather comes back to me that it was \$2.65 a thousand.

Q. That was upon the Pickering claim; but they ended up with more than that, I think, which was——

Mr. Momyer: I think that was finally used.

Q. (By Mr. Barnett): Oh, \$2.65?

Mr. Momyer: \$2.65 was finally used.

Q. (By Mr. Momyer): What was it that Pickering claimed?

Mr. Momyer: That was what we claimed to be the cost of the stumpage.

Mr. Barnett: Oh, yes.

A. Now, that is the best of my memory, sir.

(Deposition of Lewis Lilly.)

\$2.65 was the figure arrived at. You needn't put this down in the record, but the record will check me on that.

Q. (By Mr. Barnett): Do you remember what the other theory was as to what it should be?

A. No, sir, I don't.

Q. Do you know that was referred to?

A. Yes, that's right. [7]

Q. Were there any other points that were referred to you, Mr. Lilly?

Mr. Levit: If you recall.

Mr. Barnett: Of course, if he recalls.

A. I don't know that there were any points in which there was a complete cleavage of opinion between the two that were referred to me. I think I acquiesced in the others probably there. For example, that allowance on the claim for log stain and excessive logging costs, I think I was in agreement with what—what was that?—\$25,000.00 figure that we had there.

Mr. Levit: That is right.

A. I think that was the one.

Q. (By Mr. Barnett): That is what it was?

A. Yes.

Q. Do you know how that was arrived at?

A. I can't give you the makeup of that. No, that was a decision based on the equities as I saw them.

Q. But you don't remember how you arrived at it?

(Deposition of Lewis Lilly.)

A. I don't remember how I—of course, I didn't keep a record of—this is off the record, but the record was being kept by the two appraisers in the case, and I didn't keep any.

Q. You made no attempt to?

A. I didn't keep an independent record, no.

Q. You went on the theory that unless you were consulted, it wasn't your business?

A. Oh, just a matter of general interest, of course. [8]

Q. Well, now, there seems to have been three figures, as far as I can find out that were involved in that \$25,000.00: One was excessive logging costs, which Pickering showed in its claim as \$42,797.04; log stain and rot and checking, which was in the sum of \$36,149.95; and log decking in the sum of \$12,492.35.

A. Roughly about \$90,000.00, is it?

Q. I haven't figured it up to get the amount.

A. I just added it in my head as you went along.

Q. I will have to add it up for you.

Mr. Levit: Something over ninety thousand.

A. I was adding it as you went along. That is roughly ninety thousand?

Mr. Barnett: Roughly ninety-one and a half thousand, as I get it.

A. I just added it by thousands as you went along.

Q. All right. Those were the three items that

(Deposition of Lewis Lilly.)

you arrived at the twenty-five thousand, is that right?

A. I imagine those were the items included.

Q. Were you in on that decision?

A. I don't think that I was—that there was a final joining of issue. I think that was agreed upon by the—I am speaking from memory—I think the appraisers agreed on that figure; and it was agreeable to me.

Q. And you acquiesced in it?

A. I was there while they were arguing it; and whether I [9] was brought into the discussion or not, sir, I can't answer.

Q. As to whether or not they couldn't agree, and had you decide that, you don't remember that?

A. I don't recall. I think that was one of the points that was mentioned.

Q. You don't recall that?

A. I don't recall.

Q. You think they worked that out between themselves?

A. To the best of my knowledge, that was it, yes.

Q. Were you consulted about adding \$15,095.00 to the continuing expense for the year which was the depreciation of the mills that burned down—it would have been the depreciation in that year? Do you remember whether you consulted with them, or did they have any talk with you about that?

A. Not that I recall. I don't think I was asked to—to the best of my knowledge and memory, and I

(Deposition of Lewis Lilly.)

don't recall that there was a difference—that there was an issue joined on that.

Q. You don't think they did on that?

A. I don't think they called on me for a decision on that at all.

Q. Well, I imagine now from what Mr. Maloney said—I want to hear what you say.

A. Now, you know, and you must remember that I am always working from a memory.

Q. I understand that, Mr. Lilly, as well as you do; and I am trying—— [10]

A. I want you to understand that I am not trying to give any testimony that is not factual, or that I don't know.

Q. I am sure of that; but I am also sure that a man can only say what his memory prompts him to say.

A. That is it precisely.

Q. We are not going to have any trouble here, Mr. Lilly, at all.

You were talking about that \$25,000.00. I didn't get whether you said they worked out the \$25,000.00 figure themselves, or whether you voted on that.

Mr. Levit: He couldn't remember. He acquiesced in it, and he was in on the discussion, as I recall.

A. I don't remember that there was any impasse there at all.

Q. (By Mr. Barnett): You don't remember that they had called on you to decide the differences?

A. I don't—I don't think they did. I don't think so. I may have had part in the general discussion.

(Deposition of Lewis Lilly.)

Q. I understand that they didn't keep any secrets from you.

A. Oh, no. Both were very frank about it. Neither secrets nor views, if I may put it.

Q. If you heard the discussion, do you know what the objection was to the 42,797.04 as excessive logging costs?

A. I don't, sir.

Q. You don't know what the objection was?

A. I don't recall that, no. [11]

Q. Do you remember the evidence concerning the log stain and the rot and the end checks that was made by a man from the lumber association in making a test run, and then by Mr. Thomas making estimates of it that would have occurred within the nine months and within the year—that would have occurred within that time? Do you remember that evidence?

A. I remember the discussion. I remember the point being raised in a general way. Now, what—beyond that, sir, I can't say.

Q. You don't know what objections were made at the time to it?

A. Whether it was excessive or not, I can't recall at this time, what the discussion was.

Q. Do you remember what discussion or objection there was to the log decking in the amount of \$12,492.35?

A. No, I can't answer that.

Q. As I understand it, you can't even remember that you had to decide how much should be allowed for those claims?

(Deposition of Lewis Lilly.)

A. That is just quite correct. I can't say that that was submitted to me specifically. It may have been in order to reach an agreement in regard to it.

Q. But you can't remember that?

A. I can't say exactly that that was submitted, no. That is, with the definite assurance that I would be stating a fact.

Q. Do you remember whether there was any other disagreement about using OPA ceiling prices to determine the cost of [12] lumber used in the box factory—whether the freight differential should be considered?

A. I think there were two views there, as I recall; Mr. Herrick had one view, and asserted one view to the effect that he thought the material being there should carry a higher price than OPA price; and Mr. Maloney said——

Q. Yes.

A. (Continuing): ——I think took the opposite viewpoint, that the OPA price was the price to be used.

Q. Do you recall in regard to that, making the decision?

A. I think I acquiesced in the decision of the OPA price plus the agreed upon freight differential. I think that freight differential was Fresno and Merced or Fresno and Modesto; I can't tell which.

Q. I don't care about that. We can find out what that is. I am trying to find what the difference of the viewpoints was.

(Deposition of Lewis Lilly.)

A. Yes. Well, I think that I have stated it as clearly as I can. The OPA price in one instance; and, as I recall, Mr. Herrick's contention for a higher price.

Q. Is it your recollection that you agreed with Mr. Herrick on that?

A. No, I agreed, I think—I think I agreed with Mr. Maloney on the OPA price. Now, I don't know whether Maloney asserted the OPA price, but I think it was—yes, it was the OPA price, as I recall it, that was later determined upon, wasn't it?

Q. It was what? [13]

A. It was the OPA price that was used, plus the freight differential, as I recall.

Q. Yes. Mr. Herrick said that he was in favor of adding the freight differential.

A. It could be. It could be.

Q. But you think that you decided on adding the freight differential?

A. I think I asserted the equity of the freight differential in that matter, yes.

Q. Do you remember of anything else where you were called upon to cast the deciding vote besides that, as to whether the freight differential should be added to the OPA ceiling price?

A. No, I don't. I don't.

Q. You think, as far as you now remember, that they fought it out themselves, and came to the agreement without requiring you to cast the deciding vote?

(Deposition of Lewis Lilly.)

A. Yes. I thought to a remarkable degree they got their viewpoints straightened out.

Mr. Barnett: I think that is all I want to know here. I am not trying to catch you. I just want to get what the facts are.

(Unreported discussion.)

Q. (By Mr. Levit): Mr. Lilly, you testified, I believe, that you have not at this time and did not keep even at the time of [14] the appraisal, any record of what occurred or what the submissions were, or what their differences were?

A. No. My sole record was the time charge for my office.

Q. And it is a fact, isn't it, Mr. Lilly, that as to the details of what took place, who made which contention, and what exactly you were called on to decide, that those things are very hazy in your memory at this time? A. Yes, yes.

Q. Now, at the same time, Mr. Lilly, you do recall, do you, that you did participate in the consideration of the entire matter? A. Yes.

Q. And you did sign the award?

A. I think I did.

Q. In fact, when you signed the award, and at the present time, you consider and do consider that the award was a fair and an equitable one, is that right?

A. I subscribed to the findings; and that is implied.

(Deposition of Lewis Lilly.)

Q. That is still your opinion, is it not?

A. Yes. I have no reason to change it.

Q. Mr. Lilly, Judge Barnett called your attention to certain statements made by Mr. Maloney. I am going to call your attention to a statement or statements made by Mr. Herrick that are part of his deposition, and a part of a letter which he addressed to Judge Barnett under date of March 1st, 1948. I am referring to Plaintiffs' Exhibit B attached to Mr. Herrick's deposition.

Mr. Barnett: His recent letter? [15]

Mr. Levit: What is that?

Mr. Barnett: His recent letter?

Mr. Levit: Yes.

Mr. Barnett: I remember it.

Q. (By Mr. Levit): You recall, Mr. Lilly, do you not, the contention of the Pickering Lumber Company in regard to the profits of the box factory was that the lumber used in the operation should be charged in at their average cost of producing all of their lumber. Do you recall that?

A. I would have to answer that this way: That if Mr. Herrick so testified, it would have been his contention.

Q. That was the Pickering Lumber Company's contention.

A. I say if Mr. Herrick so testified, that would have been the Pickering Lumber Company's contention.

Q. Yes. Now, I am going to read you a state-

(Deposition of Lewis Lilly.)

ment from Mr. Herrick's letter appearing on page 110 of his deposition, in which he states in the letter to Judge Barnett:

"I believe your contention that the profit of the box factory after the fire should be based upon the average cost of all lumber produced is erroneous, without any foundation in accounting . . ."

Do you agree with that?

A. My answer would be that I don't know that it is particularly a matter of accounting as much as it is of equity.

Q. But you agree with that conclusion?

A. That it is a matter of accounting? [16]

Q. No, I say, do you agree with that conclusion, that it is erroneous; that the method of computing the profit is erroneous?

A. I would say to you that it was not the method to be applied under the circumstances.

Q. Yes.

A. As indicated by subsequent findings which were—in which the OPA price plus the freight differential was involved.

Mr. Levit: Yes. That is all.

Mr. Barnett: I assume you wouldn't have signed it unless you agreed to it. I have been assuming that. That is all.

/s/ LEWIS LILLY. [17]

United States of America,
City and County of San Francisco,
Northern District of California—ss.

I hereby certify that on the 9th day of April, 1948, at 2:30 o'clock p.m., before me, Louis Wiener, a Notary Public in and for the City and County of San Francisco, State of California, at the offices of Messrs. Severson, Brown, Keough & McCallum, 605 Market Street, Room 1004, San Francisco, California, personally appeared, pursuant to stipulation between counsel for the respective parties, Lewis Lilly, a witness called on behalf of the defendant herein; and Messrs. Long & Levit, represented by Bert W. Levit, Esquire, appeared as attorneys for the plaintiffs, and Messrs. Severson, Brown, Keough & McCallum, represented by Harold Clinton Brown, Esquire, and Messrs. Watson, Ess, Barnett, Whitaker & Marshall, represented by Paul Barnett, Esquire, appeared as attorneys for the defendant; and the said Lewis Lilly being by me first duly cautioned and sworn to testify the whole truth, and being carefully examined, deposed and said as appears by his deposition hereto annexed.

And I further certify that the said deposition was then and there recorded stenographically by Harold H. Hart, a competent official and disinterested shorthand reporter, appointed by me for that purpose and acting under my direction and personal supervision, and was transcribed by him.

And I further certify that at the conclusion of

the taking of said deposition, and when the testimony of said witness was [18] fully transcribed, said deposition was submitted to and read by said witness and thereupon signed by him in my presence, and that the deposition is a true record of the testimony given by said witness.

And I further certify that the said deposition has been retained by me for the purpose of securely sealing it in an envelope and directing the same to the clerk of the court as required by law.

And I further certify that I am not of counsel or attorney for either or any of the parties, nor am I interested in the event of the cause; I further certify that I am not a relative or employee of or attorney or counsel for either or any of the parties, nor a relative or employee of such attorney or counsel, nor financially interested in the action.

In Testimony Whereof, I have hereunto set my hand and official seal at the City and County of San Francisco, State of California, this 17th day of April, A.D. 1948.

[Seal] /s/ LOUIS WIENER,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed D.C. April 20, 1948.

[Endorsed]: Filed C.C.A. March 9, 1950. [19]

In the District Court of the United States for
the Northern District of California, Southern
Division

No. 27,299-H

THE AMERICAN INSURANCE COMPANY, et
al., all corporations,

Plaintiffs,

vs.

PICKERING LUMBER CORPORATION, a cor-
poration,

Defendant.

DEPOSITION OF FRANK MALONEY

Be It Remembered, that on Friday, the 9th day
of April, 1948, at 9:00 o'clock a.m., pursuant to
stipulation between counsel for the respective par-
ties, at the offices of Messrs. Severson, Brown,
Keough & McCallum, 605 Market Street, Room 1004,
San Francisco, California, personally appeared be-
fore me, Agnes C. Otto, a Notary Public in and for
the City and County of San Francisco, State of
California,

FRANK MALONEY

a witness called on behalf of the defendant herein.

Messrs. Long & Levit, represented by Bert W.
Levit, Esquire, appeared as attorneys for the plain-
tiffs; and Messrs. Severson, Brown, Keough & Mc-
Callum, represented by Harold Clinton Brown, Es-

(Deposition of Frank Maloney.)

quire, and Messrs. Watson, Ess, Barnett, Whittaker & Marshall, represented by Paul Barnett, Esquire, appeared as attorneys for the defendant.

The said witness having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the above-entitled cause, did thereupon depose and say as hereinafter set forth.

It was stipulated between counsel for the respective parties that the notary public, after administering the oath to the witness, need not remain further during the taking of this deposition.

It was further stipulated that the said deposition should be recorded stenographically by Harold H. Hart, a competent official shorthand reporter and a disinterested person, and thereafter transcribed by him into longhand typewriting, to be read to or by the said witness, who, after making such corrections therein as may be necessary, will subscribe the same.

It was further stipulated that all objections to questions propounded to the said witness shall be reserved by each of the parties, save and except any objections as to the form of the questions propounded.

Mr. Barnett: Is it necessary to have a stipulation to allow the notary to depart unless needed, or——

Mr. Levit: We will stipulate to that.

Mr. Barnett: All right; but if you want her to remain.

(Deposition of Frank Maloney.)

Mr. Levit: That is all right.

Mr. Barnett: Well, you dictate the stipulation.

Mr. Levit: Well, simply that we will stipulate that the notary may be excused.

Mr. Barnett: All right.

Mr. Levit: We will also, I presume, proceed on the assumption that all objections, except as to the form of the question, are reserved to be made at the time of trial.

Mr. Barnett: Yes.

FRANK MALONEY

called as a witness on behalf of the defendant, being first duly cautioned and sworn by the notary public to tell the truth, the whole truth, and nothing but the truth, testified as follows:

By Mr. Barnett:

Q. What is your name?

A. Frank Maloney.

Q. Where do you live, Mr. Maloney?

A. I live in Sacramento.

Q. What is your business?

A. Building contractor.

Q. Were you one of the appraisers who was appointed to appraise the Pickering Lumber Company's use and occupancy claim under the insurance policies issued by The American Insurance Company; Atlas Assurance Company Limited; Cale-

(Deposition of Frank Maloney.)

donian Insurance Company; The Camden Fire Insurance Association; Columbia [3] Insurance Company of New York; Commercial Union Assurance Company, Limited; The Continental Insurance Company; Fire Association of Philadelphia; Fireman's Fund Insurance Company; Firemen's Insurance Company of Newark, New Jersey; Glens Falls Insurance Company; Globe and Rutgers Fire Insurance Company; Great American Insurance Company; The Hanover Fire Insurance Company; Hartford Fire Insurance Company; The Home Insurance Company; Insurance Company of North Amercia; National Fire Insurance Company of Hartford; National Liberty Insurance Company of America; National Union Fire Insurance Company of Pittsburgh, Pa.; New Hampshire Fire Insurance Company; New York Underwriters Insurance Company; New Zealand Insurance Company, Limited; The Northen Assurance Company Limited; Norwich Union Fire Insurance Society Limited; Pearl Assurance Company, Limited; The Pennsylvania Fire Insurance Company; Queen Insurance Company of America; St. Paul Fire & Marine Insurance Company; Scottish Union and National Insurance Company; Security Insurance Company of New Haven; Springfield Fire and Marine Insurance Company; The Travelers Fire Insurance Company; United States Fire Insurance Company; Westchester Fire Insurance Company; and The Western Assurance Company?

(Deposition of Frank Maloney.)

A. I believe that is correct.

Q. By whom were you appointed?

A. The Fire Companies' Adjustment Bureau.

Q. In other words, by the companies?

A. Correct. [4]

Q. Insurance companies, I mean.

A. Right.

Q. And who was the appraiser appointed by Pickering? A. Mr. Anson Herrick.

Q. And you two appointed an umpire?

A. Mr. Lilly; Lewis Lilly.

Q. Mr. Lilly? A. Lewis Lilly, yes.

Q. I am going to show you an instrument set forth beginning on page 106 of the deposition of Mr. Anson Herrick, and ask you if that is a true copy of the award returned. (Document shown to witness.)

A. To the best of my knowledge, I think it is.

Q. Do you see anything in substance different from what you remember?

A. No, I believe that is correct.

Q. Mr. Maloney, do you remember whether or not the appraisers held a hearing before they returned an award?

A. They had a—heled a hearing?

Q. Yes.

A. I don't understand that question.

Q. All right. I will put it some other way. Do you remember that before you made the award, whether or not you gave notice to the Pickering

(Deposition of Frank Maloney.)

Lumber Company and to the adjuster representing the insurance companies that you were going to have the hearing and were going to allow them to appear before you and present their claim?

A. You mean at the end of our work?

Q. No, at the beginning of your work.

A. Oh, yes. [5]

Q. That was held where?

A. I believe that meeting was held in Mr. Herrick's office.

Q. I believe it was, too. At that time——

A. It could have been at Mr. Lilly's office.

Mr. Momyer: In Mr. Herrington's office.

Mr. Levit: You mean at Orrick's office?

Mr. Momyer: Yes, at Herrick's office.

A. I think that was when we were going to send out a notice, and we wanted to notify both sides; and I believe that was at Mr. Herrick's office, to the best of my knowledge.

Q. (By Mr. Barnett): I want you to take this seriously. Now, my object here is not to confuse you; it is just the opposite. Let me ask you a few questions.

Do you remember that it was in a long conference room with a long conference table?

Mr. Levit: Well, it is obvious to me, Judge Barnett, from Mr. Maloney's statement, that he misunderstood your question. He thought you were referring to the meeting of the appraisers themselves, in which they decided to make the award.

(Deposition of Frank Maloney.)

Q. (By Mr. Barnett): I don't want him to misunderstand me.

A. I did misunderstand you, to what you have reference.

Q. All right. That is just what I want to avoid; and if at any time you do, you tell me so. I am trying to find out whether you first gave a notice to the people that they could—for them to appear and present their claims before you. [6]

A. I will answer that, yes, with this explanation: Mr. Herrick and I met; we selected the umpire; then Mr. Herrick notified the Pickering people, and I notified the Fire Companies' Adjustment Bureau. Mr. Herrick, being in San Francisco, made arrangements for both parties for the time and place of the meeting. He might have notified me either by phone or by letter, as to an agreeable date. So then the dates were set for both parties to appear at this meeting at this attorney's where we had our first meeting.

Q. That is what I am talking about, when the various parties appeared at that meeting at the attorney's office. Do you remember where that was?

A. Well, I have forgotten the attorney's name at this time.

Q. It was in an attorney's office in San Francisco? A. That's right.

Q. (By Mr. Levit): It was one of the attorneys for Pickering, wasn't it?

A. Oh, yes, the Pickering attorney. That is where the meeting was held.

(Deposition of Frank Maloney.)

Q. (By Mr. Barnett): Well, I may just satisfy your curiosity there. It was in the office of Messrs. Orrick, Dahlquist and so forth, in the Financial Center Building.

A. That's correct.

Q. At that meeting, did the parties present what they had to say?

A. Both parties presented their evidence of those things that we were there for, yes. [7]

Q. Were the witnesses sworn?

A. They were not.

Q. Do you remember whether both parties filed the figures that they claimed they depended upon?

A. They did.

Mr. Levit: What is the answer?

(Answer read by reporter.)

Q. (By Mr. Barnett): Would you recognize them if you saw them?

A. I feel sure I would.

Mr. Barnett: Let me have our proof of claim.

(Unreported discussion.)

Q. (By Mr. Barnett): Except for notations in pencil and in ink, do you recognize that as a true copy of the proof of claim?

Mr. Levit: We will stipulate that is a copy of the proof of claim filed by Pickering.

Mr. Barnett: Except for the notations thereon in pencil and ink.

Mr. Levit: Do you plan to put this in evidence?

Mr. Barnett: No, I don't.

Mr. Levit: Then why worry about the notations?

Mr. Barnett: Well, because I don't want to have

(Deposition of Frank Maloney.)

an argument with the witness explaining to him all around.

Mr. Levit: All right.

Q. (By Mr. Barnett): Do you recognize this that I hand you as a true copy of the proof of claim that was filed by Pickering Lumber Corporation and that was presented to the [8] appraisers when they held their hearing? A. I do.

Mr. Levit: May we have that marked for identification, as long as we have referred to it? I am not suggesting that it be attached to the deposition, but let it be marked for identification.

Mr. Barnett: I wish you would mark that:

(Proof of claim marked Defendant (Maloney) Exhibit 1 for Identification.)

Mr. Barnett: I am not going to introduce what I just showed you, Mr. Maloney, because it is not necessary to do so; it has been marked and attached to Mr. Herrick's deposition. I am just trying to see that we all know what we are talking about.

Do you remember who the accountant for the insurance companies was in that hearing?

A. Mr. Baker.

Q. I will show you a set of figures, and ask you if that is what Mr. Baker presented to the appraisers. (Document shown to witness.)

A. Yes, I think it is.

Mr. Levit: Well, this should have been attached to the original deposition of Herrick.

Mr. Barnett: Mr. Herrick made us promise to

(Deposition of Frank Maloney.)

give this back, and we agreed to put in a photostat.

Mr. Levit: You photostated it? [9]

Mr. Barnett: We have got to return it to him.

Mr. Levit: I see.

Mr. Barnett: Don't you remember?

Mr. Levit: I see.

Mr. Barnett: Mr. Herrick didn't want to permanently release any of his papers, and we agreed to photostat it.

Q. Is that it, Mr. Maloney, what I just showed you? A. Yes.

Mr. Barnett: Mark that, will you?

Mr. Levit: It is already marked. I suggest that you refer to it by the former mark.

Mr. Barnett: All right. It bears the identification "Defendant's Exhibit 3."

Mr. Levit: And was so marked on Mr. Herrick's deposition.

Mr. Barnett: It was so marked when it was put in evidence in Mr. Herrick's deposition.

Q. Are those two sets of figures, the figures that the appraisers used in arriving at their result?

A. Yes.

Q. Did you ever actually examine the books of Pickering Lumber Corporation?

A. Not thoroughly, no.

Q. Well, did you ever go down there at all?

A. The only reference we had with Pickering Lumber Corporation, I recall Mr.—the bookkeeper that was there—what was his name?

(Deposition of Frank Maloney.)

Mr. Barnett: Mr. Momyer?

Mr. Momyer: Mr. Lucas. [10]

A. Mr. Lucas. From time to time Mr. Herrick would call him for information in regard to the books; and a time or two—I don't know how many times—we had him over at the hearings.

Q. (By Mr. Barnett): But I mean you didn't actually get the actual books of Pickering Lumber Corporation, either down at Standard, California, or have them sent up here?

A. No, not to my knowledge.

Q. Except to the extent that you called upon them for the frequent additional information, you went on these figures? A. That's right.

Q. Do you remember that——

Mr. Levit: Pardon me, Judge. Do you have in mind that there were certain other analyses of the figures presented by a firm of accountants, Nowell——

Mr. Barnett: Yes, but I don't know what they furnished them; but I know they called me, and I told them to give them whatever they asked for.

Mr. Levit: And that those were in addition to the matters which you mentioned?

Mr. Barnett: They both told me so. I have not seen them.

Mr. Levit: Yes. Nowell Robinson was the name.

Mr. Momyer: Robinson, Nowell.

Mr. Brown: Lucas is with Nowell.

Mr. Levit: I see. I didn't realize that.

(Deposition of Frank Maloney.)

The Witness: He is with them. [11]

Mr. Barnett: I will say this: That we will get it for you and furnish it if you want it.

Mr. Levit: No, no. I remember that from Mr. Herrick's testimony; and I thought perhaps you had neglected to mention it; but if Lucas was with them, why, that takes care of it.

Mr. Barnett: He was the man. That is an accounting firm, you know.

Mr. Levit: Yes.

Q. (By Mr. Barnett): I will ask you if you remember, there was no actual difference in the actual figures taken from the books in either those presented by Pickering in its proof of loss or in Baker's, is that right? It was a difference in handling?

A. Just the difference in setup primarily.

Q. That is, they came to different conclusions?

A. Yes.

Q. But there was no dispute about the accuracy of the figures they used? They used the same figures, did they not?

A. I feel sure that they did.

Q. Was that the reason that you did not believe it necessary to go and examine Pickering's books?

A. That's right.

Q. All right. I will again show you this statement gotten up by Mr. Herrick, and purporting to show what the appraisers did in arriving at their result—and I will ask this be marked Defendant's Exhibit 1. [12]

(Deposition of Frank Maloney.)

Mr. Levit: For the purpose of the record, I would like to identify this as being the same as Defendant's Exhibit 7 on Mr. Herrick's deposition.

Mr. Barnett: That is what it is.

Mr. Levit: And I believe that in the course of the discussion of that exhibit, the pages were numbered. I was trying to find the reference in here of the numbering of those pages. Yes. Let's number them as we did on page 60 of Mr. Herrick's deposition. May I suggest that we number the pages in this exhibit, page 1 to be the page headed "Finally Revised Computation"; page No. 2 being the page headed "Box Factory 'Salvage' Statement"; No. 3, the page headed "Reconcilement of Insurable Value and Loss and Claimed with Appraisal"; and page No. 4 headed on the left "Composition of appraisal changes."

Mr. Barnett: That is entirely satisfactory. That is the way it appeared in Mr. Herrick's deposition.

(Said document entitled "In re Pickering Lumber Corporation, B. I. Loss Claim, Finally Revised Computation," marked Defendant's Exhibit 1 (Maloney).)

Q. (By Mr. Barnett): I notice on this statement on page 4, in stating the continuing costs for the year, appears item No. 2, which reads as follows: "Depreciation on destroyed property omitted in error from claim, \$15,042.00." I will show it to you. Right at the top, item 2.

(Deposition of Frank Maloney.)

A. I remember discussion about it; but I cant' remember [13] all of this sheet at all. I haven't even gone into it.

Q. No, you told me you hadn't; but I just want to call your attention to that. A. Yes.

Q. Do you remember that adding—in calculating for the year the continuing costs, adding this \$15,-042.00 as representing depreciation on the sawmill.

A. I remember the discussion, and it was something that Mr. Herrick had found in their books. He contacted this Mr. Lucas in regard to it; and I told him if he was going to talk to Lucas about it, I would like to have him also talk to Mr. Baker on the matter, which he did; and it was apparently all right from a bookkeeper's standpoint; and I acquiesced, because Mr. Lilly and Mr. Herrick worked these figures out. I did not.

Q. All right. Well, then, is all that you know about that fifteen thousand is that both the bookkeepers thought it ought to be out; and therefore you agreed? Is that all you know about it?

A. Yes, that is all I can remember in regard to that point.

Q. You considered it an accounting problem?

A. I did. It was over my head a mile.

Q. All right. Now, according to these figures as I find them, the Pickering Lumber Corporation in its proof of claim, claims as continuing costs excessive logging costs in the sum of \$42,797.04. Do you remember about that? A. I do. [14]

(Deposition of Frank Maloney.)

Q. I don't mean do you remember that exact figure. A. No, I remember.

Q. I assume you don't.

A. I remember the excess logging costs.

Q. And that figure doesn't seem to be out of line, according to your memory?

A. No, it is pretty close.

Q. Do you remember what was done with that; whether it was allowed or not?

A. No, not—as a single individual item, it was not.

Q. Do you remember why it was not?

A. There was a great deal of discussion in regard to the excessive logging costs; and the values to them; and that there should be some recovery, but they would be benefitted by it in the longer run.

Q. Do you remember why it was disallowed?

A. It wasn't disallowed. It was considered. Now, we went into that matter along with the entire page.

Q. Take your time. I know how hard this is.

A. Well, it isn't hard.

Q. I mean to find things, and things like that. I have the same trouble.

Mr. Levit: Let the record show that the witness is examining the first page of Defendant's Exhibit 3 attached to Mr. Herrick's deposition.

A. We had this individual sheet up for discussion.

Q. (By Mr. Barnett): Do you mind calling out the figures used, [15] so we will know what figures

(Deposition of Frank Maloney.)

they are? A. Do you mean the entire setup?

Excessive logging costs	\$42,797.04
Grazing rentals	1,461.81
Log stain	36,149.95
Log Decking	12,492.35
Blow Pipe	908.80
Moving Lumber	817.14
Sticker and Yard Clean-up	4,309.70
Tax, etc.	400.00

A total of\$96,413.17

Q. (By Mr. Barnett): Well, now, on the side there, in Mr. Lilly's handwriting, there he says——

Mr. Levitt: In whose handwriting?

Q. (By Mr. Barnett): I mean Mr. Herrick's handwriting, he says \$25,000.00. Do you know what that means?

A. That means that we allowed \$25,000.00 for the first 4 items on the sheet, minus grazing rental, which we did not penalize them on, as I remember.

Q. You just threw it out?

A. Well, we took care of that in another manner; he did in his bookkeeping. Mr. Lilly and he subtracted that from that total figure; and then they went to work with their slip sheets again—they had sheets of paper everywhere, as you can understand—and made our build-up as we went along.

Q. As I understand, then, leaving out the grazing rentals, [16] why, you allowed \$25,000.00 on account

(Deposition of Frank Maloney.)

of Pickering's claim for excessive logging costs, log stain, and log decking? A. Yes.

Q. Do you remember what the argument was about it?

A. It was a question of our best judgment, taking into consideration the testimony as we heard it; betterments which might be acquired; the longer run at the mill, they would naturally get appreciation or something from having these excess logs. The question was as to the actual loss in regard to the stain over a nine-months period. There was many factors involved, and they were all considered; and there was a lot of time put in on that page. It wasn't a—it wasn't just a snap shot of \$25,000.00 by no means. It was considered from all angles to our best judgment; and that was the fair amount for that particular item.

Q. Then you didn't throw out excessive logging costs? A. No.

Q. Nor the log stain? A. No.

Q. Nor the log decking? A. No.

Q. Do you remember whether or not you tried to determine how much log stain they had suffered?

A. Well, we had evidence presented by two different parties at the original hearing as to what they claimed the log stain amounted to.

Q. Do you remember whether or not the appraisers accepted that estimate from those experts?

A. I personally didn't accept it. I thought it was

(Deposition of Frank Maloney.)

excessive. I have forgotten what Mr. Lilly's opinion was on it.

Q. About that figure of \$42,797.04 for excessive logging costs, did the appraisers accept that figure? I am not talking about accepting it as to whether they were entitled to recover it, but as to——

A. You mean accept the whole \$42,000.00 figure?

Q. I mean, did they accept it that that was actually the loss? I am not talking about whether you thought they should actually recover that, but did they accept that figure?

A. Well, I couldn't truthfully remember that. That is the first item on there, isn't it?

Q. Yes, and I know this is hard. Take your time, Mr. Maloney.

Mr. Levit: If you are not sure, say so.

A. No, I am not sure. I really am not. No, I really am not sure.

Q. (By Mr. Barnett): All right. But you are sure that you didn't accept the figure of \$36,149.95 as the amount of the log stain?

A. That I did not. Correct.

Q. Do you remember about the log decking, whether or not the appraisers accepted the figure of \$12,492.35 as the cost of the log decking?

A. I will answer that in this manner, that we took into consideration, in our best judgment, the extra logs that they would have recovered—the extra recovery—that they would make a recovery because of the fact [18] that they had additional logs out

(Deposition of Frank Maloney.)

of the woods. The woods were bottlenecked. We knew that, and we know that in many mills' operations they received a lot of value in those logs. Excess logging costs is an operation that any operator will go through in order to get his logs out so that he can run during the wintertime. That matter was discussed very thoroughly.

Q. (By Mr. Barnett): I know that was; but you are now giving me the reasons why you didn't think it ought to be allowed; but the question is, did the appraisers accept the figure that the actual log decking did amount to \$12,492.35, or did they think that the books were incorrect about that?

A. No, I believe that they—I believe that they went into Pickering's books; and there was some discussion on it. I believe that they accepted that figure.

Q. But you did not accept the theory that it ought to be allowed for the reasons that you have mentioned?

A. That's right.

Q. You don't remember whether or not they accepted the figure as to the actual amount of excess logging costs?

A. Of what?

Q. Of excess logging costs? I am not talking about whether they accepted the idea that it should be allowed, but whether they thought the books properly recorded the amount of excess logging costs.

A. To the best of my knowledge, neither Mr. Lilly nor Mr. Herrick, who were going into Picker-

(Deposition of Frank Maloney.)

ing's books, ever [19] questioned the books at any time, as to their accuracy. This does not mean that I accepted the figure of excess logging cost used by Pickering—I did not.

Q. You didn't go into that feature of it?

A. I couldn't.

Q. What? A. I would get lost.

Q. I say you did not? A. No.

Q. You had to rely upon them for that?

A. I definitely relied on Mr. Herrick and Mr. Lilly.

Q. As to the accuracy of the figures?

A. That's right.

Q. But you did want to be heard as to whether or not—how it should be handled?

A. That's right.

Q. All right. Now, you say that the experts that estimated the amount of log stain, they showed that the big end of the log stain would not have happened within the nine months insured, didn't they?

A. The experts testifying for Pickering did, yes.

Q. They showed the big end of it would have happened within the nine months?

A. That is what the experts for Pickering testified to at the hearing.

Q. Do I understand you were not satisfied with the method by which they estimated it?

A. I was not.

Q. Do you remember what it was that you thought was wrong about it?

(Deposition of Frank Maloney.)

A. I thought it was excessvie.

Q. Yes, I know.

A. My best judgment—I had plenty of counsel—friends in the sawmill business, and people [20] that I have talked with, who have been running planing mills and box factories and have logging operations. I went into this matter on the outside to get information, for I have been in the building business all of my life, and I have been buying lumber, and I have an interest in the largest planing mill in Sacramento; and I know what the boards are in that company; and I know how much damage stain does. I know that right during that time, and almost up to four or five months ago—I am still buying doors with stain in them; and I know that box shook will show stain; one by twelve boards for shelving will show stain with no degrading of it for stain; two by fours, they come through with stain.

Q. Also there was the experts' estimate on rot that would happen? A. I never——

Q. Was their estimate as to that acceptable to you? A. It was not acceptable.

Q. Do you know how you arrived at that conclusion? A. I do.

Q. How did you arrive at it?

A. By consulting men who I considered experts in sawmill operations.

Q. Do you remember who you consulted?

A. I consulted several in Sacramento.

Q. Do you remember——

(Deposition of Frank Maloney.)

A. One of their own witnesses. [21]

Q. That is all right. A. Kirk Setzer.

Q. That is as good a person to consult as anybody else, but—— A. Sure.

Q. Do you know anybody else?

A. Yes, Mr. Thompson, who has the Sacramento mill. He has many mills up in the woods, and so forth. Oh, I talked to lots of people.

Q. Well, I guess it is not material. You didn't make any notes at the time you consulted with them?

A. Certainly, but I didn't keep them.

Q. All right. You don't have them now?

A. No, I wish I did, for I would sure talk so fast I would make you silly.

Q. Maybe you can do that without the notes. Maybe you could make me silly without your notes.

A. Well, that has taught me a lesson, anyway, to never let go of them.

Q. We won't make any point about it, whether you have them or you don't, Mr. Maloney. I am just trying to get you, as near as you can, to tell me exactly what happened.

A. That's all right.

Q. Do you remember how you arrived at the profit of the box factory—as to the cost of the material used in the box factory?

A. Yes. We went to town on that baby for about three days. [22]

Q. All right. Tell us about that.

A. Believe me. Well, it was a question of freight

(Deposition of Frank Maloney.)

differential, and the cost of the stuff, and the allocation of this and that and the other thing; and Mr. Herrick and Mr. Lilly I think outvoted me on that. However, it wasn't such a great deal. And then, of course, they did the bookkeeping. I think that we allowed—I have jotted it down here—\$31.55 was the figure that we used.

Q. Per thousand? A. Yes.

Q. I think that is right. That is my information.

A. I have that figure jotted down here.

Q. Well, do you know how you arrived at it?

A. Oh, yes, we used the OPA ceiling price, plus the freight differential.

Q. So the OPA ceiling price allowed the freight differential, didn't it?

A. No, we used the OPA ceiling price plus the freight differential.

Q. But the OPA regulations provided for that, didn't they? A. Oh, sure they did.

Q. So you were actually using OPA ceiling for that?

A. That's right. But we added a very [illegible] freight differential.

Q. What I meant, you weren't departing from the OPA in doing that?

A. No. Except we increased the amount. That

(Deposition of Frank Maloney.)

was the only known price that we had at the time.

Q. You say you had a long argument about that, and they outvoted you on that. What did you want to do, do you remember? [23]

A. I didn't want to give them the freight.

Q. Was that the only difference between you?

A. Yes.

Q. That was the only difference?

A. That's right. I didn't want to allow the freight.

Q. Otherwise you were together on that?

A. That's right. My opinion was that the lumber would have to be put on the green chain; and you had to go in and load it and take it to the job; and somewhere it is going to cost them that even if they took it to the box factory and handled it there; and I didn't think it was necessary to give the freight on it. That is where our only difference of opinion was.

Q. Outside of that, you got along on this?

A. Oh, yes.

Q. All right. Did the appraisers come to the conclusion that Pickering could have reported a loss on its box factory at \$31.55 per thousand?

A. I didn't consider that.

Q. You did not consider that? A. No.

Q. Then why did you use the OPA?

A. Standard price. The known price. It was the price that the law prescribed and Mr. Herrick and Mr. Lilly stated that was the proper accounting practice.

(Deposition of Frank Maloney.)

Q. You say you didn't know any other?

A. What do you mean by that?

Q. I thought you said a while ago—if I misunderstood you, I want you to correct yourself. I am not here to heckle you. [24] I am merely trying to get your story in mind. A. I know that.

Q. I thought you said "We didn't know any other price."

A. Oh, well, that is rather a broad subject. No one up in that neck of the woods could find out what you could purchase lumber for for a box factory. The question was whether you could get it, because, you know, there was a lumber shortage at the time; everybody needed all the logs and all of the lumber that they could get a hold of at that particular time.

Q. Well, the basis wasn't what you could purchase it for? A. No.

Q. It was what had been established by the government?

A. Right. That is what we worked our price from.

Q. Was that the only consideration?

A. That's right as far as the price base was concerned.

Q. There wasn't any other?

A. Not to my knowledge.

Mr. Barnett: I have covered everything I have down here to ask you.

(Unreported discussion.)

(Deposition of Frank Maloney.)

Mr. Barnett: Just one more question:

Q. Do you know how much difference it made using the OPA ceiling price instead of average cost in figuring the profit of the box factory?

A. No, I don't.

Q. Do you have any general recollection? [25]

A. No, I don't; and I had that down, too, because Mr. Lilly and Mr. Herrick worked the thing up there. We had that thing pretty well settled, but I just—when you asked me, I was trying—

Q. To figure how much it might come to?

A. I was just trying to see what that differential would have been; but I really can't say. I am a little dumb on it.

Q. There wasn't any question about the number of feet involved, was there? A. No.

Q. Both accountants had the same number of feet, and you accepted that?

A. To the best of my knowledge, yes.

Q. So that all that it would be would be to take the number of feet, and then the difference between the average cost as set up and the \$31.55 figure, and then figure it out that way?

A. Yes, but we allowed some items of cost that were not claimed by Pickering.

Q. That is all you have to do?

A. That is what we did.

Mr. Barnett: All right. That is all.

By Mr. Levit:

Q. Mr. Maloney, in deciding to use the figure of

(Deposition of Frank Maloney.)

\$31.55, you took into consideration the basis on which the claim was set up for figuring in the proof of claim, did you not?

A. Oh, yes, they dug into that.

Q. And you also took into consideration, did you not, all [26] of the testimony that was produced, the evidence that was produced at the hearing by Pickering and by the insurance companies on the proper way of estimating that cost?

A. We did.

Mr. Levit: That is all.

Mr. Barnett: That is all.

Q. (By Mr. Levit): You stated, Mr. Maloney, that you consulted other people in connection with the appraisal. Was that consultation with these people as experts? In other words, you didn't attempt to get information concerning the Pickering operations from anybody outside, did you?

A. I never mentioned the Pickering operations to anybody that I talked to.

Mr. Barnett: The evidence shows that they accepted the actual figures from Pickering's books. The people that went down from the insurance companies to audit them, didn't question the figures.

Q. (By Mr. Levit): But I understood that you talked to other people. You talked to them as experts merely on the general problems involved, and not on the specific Pickering operations?

A. That's correct.

Mr. Levit: That is all.

United States of America,
Northern District of California,
City and County of San Francisco—ss.

I hereby certify that on the 9th day of April, 1948, at 9:00 o'clock a.m., before me, Agnes C. Otto, a Notary Public in and for the City and County of San Francisco, State of California, at the offices of Messrs. Severson, Brown, Keough & McCallum, 605 Market Street, Room 1004, San Francisco, California, personally appeared, pursuant to stipulation between counsel for the respective parties, Frank Maloney, a witness called on behalf of the defendant herein; and Messrs. Long & Levit, represented by Bert W. Levit, Esquire, appeared as attorneys for the plaintiffs; and Messrs. Severson, Brown, Keough & McCallum, represented by Harold Clinton Brown, Esquire, and Messrs. Watson, Ess, Barnett, Whittaker & Marshall, represented by Paul Barnett, Esquire, appeared as attorneys for the defendant; and the said Frank Maloney being by me first duly cautioned and sworn to testify the whole truth, and being carefully examined, deposed and said as appears by his deposition hereto annexed.

And I further certify that the said deposition was then and there recorded stenographically by Harold H. Hart, a competent official and disinterested shorthand reporter, appointed by me for that purpose and acting under my direction and personal supervision, and was transcribed by him.

And I further certify that at the conclusion of the taking of said deposition, and when the testimony

of said witness was [28] fully transcribed, said deposition was submitted to and read by said witness and thereupon signed by him in my presence, and that the deposition is a true record of the testimony given by said witness.

And I further certify that the exhibit hereto attached and marked "Defendant's Exhibit 1 (Maloney)" is the exhibit referred to and used in connection with the deposition of said witness.

And I further certify that the said deposition has been retained by me for the purpose of securely sealing it in an envelope and directing the same to the clerk of the court as required by law.

And I further certify that I am not of counsel or attorney for either or any of the parties, nor am I interested in the event of the cause; I further certify that I am not a relative or employee of or attorney or counsel for either or any of the parties, nor a relative or employee of such attorney or counsel, nor financially interested in the action.

In Testimony Whereof, I have hereunto set my hand and official seal at the City and County of San Francisco, State of California, this day of, A.D. 1948.

.....

Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed D.C. June 9, 1949.

[Endorsed]: Filed C.C.A. March 9, 1950. [29]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK
TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents, exhibits and depositions, listed below, are the originals filed in this Court, or a true and correct copy of an order entered on the minutes of this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Appellant, to wit:

Complaint for Declaratory Relief.

Second Amended Answer and Counter Claim.

Reply to Counterclaim in Second Amended Answer.

Amendment to Reply to Counterclaim in Second Amended Answer.

Defendant's Request for Findings of Fact and Conclusions of Law.

Memorandum Opinion.

Minute Order of December 27, 1949—Order Entering Judgment in Favor of Plaintiffs, Plaintiffs to Have Until January 6, 1950, to Appear and Lodge Findings of Fact and Judgment.

Findings of Fact and Conclusions of Law.

Judgment on Findings.

Notice of Appeal.

Bond on Appeal. [30]

Designation of Contents of Record on Appeal.

Deposition of ANSON HERRICK, Thursday, August 28, 1947, Filed March 17, 1948.

Deposition of LEWIS LILLY, Friday, April 9, 1948, Filed April 20, 1948.

Deposition of FRANK MALONEY, Friday, April 9, 1948, Filed June 9, 1949.

Reporter's Transcripts:

For June 7, 1949, Filed February 23, 1950, Pages 1-43.

Partial Transcript for June 8, 1949, Filed March 6, 1950, Pages 1-24.

Partial Transcript for June 8, 1949, Filed September 7, 1949, Pages 1-74A.

For June 9, 1949, Filed September 7, 1949, Pages 1-123.

For June 10, 1949, Filed September 7, 1949, Pages 124-167.

Partial Transcript for June 10, 1949, Filed February 24, 1950, Pages 168-192.

For June 10, 1949—2 P.M., Filed September 7, 1949, Pages 1-45.

For June 13, 1949, Filed September 7, 1949, Pages 1-78.

Plaintiffs' Exhibits Nos. A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, and W.

Defendant's Exhibit Nos. 1, 2, 3, 4, 5, 7, and 7.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 7th day of March, A.D. 1950.

C. W. CALBREATH,
Clerk.

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12491. United States Court of Appeals for the Ninth Circuit. Pickering Lumber Corporation, a corporation, Appellant, vs. The American Insurance Company, et al., Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed March 7, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 12491

PICKERING LUMBER CORPORATION, a Corporation,

Appellant,

vs.

THE AMERICAN INSURANCE COMPANY,
et al.,

Appellees.

APPELLANT'S DESIGNATION OF ALL OF
THE CERTIFIED RECORD WHICH IS
MATERIAL TO THE CONSIDERATION
OF THIS APPEAL

Pickering Lumber Corporation, the appellant in the above cause, pursuant to Rule 19, sub-paragraph

6, of the Rules of this Court, hereby designates the following as the portions of the certified record which are material to the consideration of this appeal, to-wit:

The entire certified record, except the final arguments of counsel (which commence with line 22, on page 171, of the official stenographic transcript of the evidence taken in the morning session on Friday, June 10, 1949, and embrace all of the remainder of the original stenographic transcript, to and including line 11, on page 76, of the transcript taken on Monday, June 13, 1949).

/s/ HAROLD C. BROWN,

/s/ HENRY N. ESS,

/s/ CHARLES E. WHITTAKER,

Attorneys for Appellant, Pickering Lumber Corporation.

Received Copy Hereof this 8th day of March, 1950.

LONG & LEVIT,

Attorneys for Appellees.

[Endorsed]: Filed March 8, 1950.

In the
United States Court of Appeals
For the Ninth Circuit

PICKERING LUMBER CORPORATION, a Corporation, *Appellant*,
VS.
THE AMERICAN INSURANCE COMPANY, ET AL., *Appellees*.

APPELLANT'S BRIEF.

HAROLD C. BROWN,
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Attorneys for Appellant.

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In the
United States Court of Appeals
For the Ninth Circuit

PICKERING LUMBER CORPORATION, a Corporation, *Appellant*,

vs.

THE AMERICAN INSURANCE COMPANY, ET AL., *Appellees*.

APPELLANT'S BRIEF.

No. 12491.

**STATEMENT OF THE PLEADINGS AND FACTS DIS-
CLOSING THE BASIS UPON WHICH IT IS CON-
TENDED THAT THE DISTRICT COURT HAD JURIS-
DICTION, AND THAT THIS COURT HAS JURIS-
DICTION TO REVIEW THE JUDGMENT.**

Appellees, being thirty-six fire insurance companies, commenced this action in the District Court of the United States for the Northern District of California, Southern Division, by complaint asking a declaratory judgment determining a report of appraisers, appointed pursuant to the appraisal provisions of policies of use and occupancy insurance issued by them to appellant, to be valid and binding upon the parties (R. 2-15).

Appellant filed its answer, and counterclaim in two counts (R. 49). The answer denied the award was valid and binding upon the parties. The first count of the counterclaim (R. 53), briefly summarized, alleged that the ap-

praisers misconceived their duties, and mistook and exceeded their authority, and failed to discharge the submission, and undertook to construe, and misconstrued, provisions of the policies, and committed and acted upon fundamental gross errors of law, and omitted items of loss insured by the policies, and made calculations upon unlawful and erroneous bases, in that:

(1) They failed to find and state (a) the amount of extra logging expense incurred by appellant after the fire, in partial logging operations to reduce loss; (b) the amount of expense incurred by appellant in extending its decking yard, and logging railroad tracks therein, to "deck" the logs brought in to the millsite after the fire in partial logging operations to reduce loss; and (c) the amount of depreciation that accrued in the nine months loss period after the fire on the logs on hand at the time of and after the fire; and the appraisers, without making any computation respecting, and without finding the amount of, these items, and doubting them to be covered by the policies, made an arbitrary, unauthorized and void lump sum compromise, at \$25,000.00, of those items aggregating \$91,439.34, to appellant's injury in the amount of \$66,439.34;

(2) They, in violation of the submission, and contrary to law, charged appellant's box lumber into its box shook mill, in its partial operations after the fire to reduce loss, at OPA ceiling prices, rather than at appellant's cost therefor, which ceiling prices were \$8.31 per thousand feet less than appellant's cost for the box lumber, thus fictionally increasing the amount of box mill profits to be credited against appellant's claim by $\$8.31 \times 8,828,644$ feet, or \$73,365.93, to appellant's injury in that amount; and

(3) They added to annual values in the year after the fire unreal depreciation on the destroyed sawmill for the year after its destruction by fire in the amount of \$15,042.17 when no such depreciation occurred, thus injuring appellant, under the contribution clause of the policies, in the amount of \$8,001.44.

The second count of the counterclaim (R. 74) was an action, in conventional form, upon the policies.

At pretrial conference it was agreed by the parties to try before the court, at this trial, only the issues of plaintiff's complaint and of the first count of appellant's counterclaim (R. 364), trial of the second count of appellant's counterclaim to await the result of this trial.

This trial was commenced on June 7th, and was concluded and taken under submission by the court on June 13, 1949. On December 23, 1949, the court rendered and filed his opinion (R. 103) holding the report of the appraisers to be valid and binding upon the parties, and thereafter, on January 16, 1950, the court entered final judgment accordingly (R. 148), from which appellant, on January 30, 1950, took its appeal to this court (R. 152).

This being an action of a civil nature, and it being alleged in appellees' complaint (R. 3), and it being admitted in appellant's second amended answer and counterclaim (R. 49), that there is complete diversity of citizenship between appellant and each of the appellees, and that the amount in controversy between appellant and each of the appellees exceeds the sum of \$3,000.00, exclusive of interest and costs, it follows that jurisdiction of this cause was conferred upon the District Court by Section 1332, Title 28, U. S. C. A., and jurisdiction to review its judgment is conferred upon this court by Sections 1291 and 1294, Title 28, U. S. C. A.

STATEMENT OF THE CASE.

Appellant owned and operated as an integrated business (R. 220, 449) a large lumber manufacturing plant, consisting of sawmill, dry kilns, planing mill, box shook mill, power houses, and similar structures, and extensive forests in connection therewith, at and near Standard, California (R. 176), and had purchased from each of appellees, on April 30, 1945, identical policies (except for names of issuer, policy number and amount) of indirect fire insurance (commonly called business interruption, or use and occupancy, insurance), aggregating \$651,000.00, effective for a term of one year from April 30, 1945 (Par. IV of appellees' complaint, R. 6, 7, 8), insuring appellant against actual loss of net profits of its business, and against those fixed charges and expenses which must necessarily continue, sustained by reason of suspension, or partial suspension, of its business, caused by fire, in the following language:

“COVERAGE”—

“2 (A). The conditions of this contract are that if the buildings and/or structures and/or machinery and/or equipment and/or supplies and/or all that property upon which the printed conditions of this policy require that liability be specifically assumed and/or raw stock (all as now or hereafter existing); in, on and/or under ‘Plantsite’, ‘Athletic Field’ and ‘Townsite’ premises situate at and near Standard Tuolumne County, California, and occupied or used for woodworking or mercantile, or for any other purposes, including (but not limited to) townsite purposes or purposes incidental or related to such woodworking or mercantile operations, be destroyed or damaged by fire occurring during the term of this policy so as to necessitate a total or partial suspension of business, this Company shall be liable under this policy for the actual loss sustained by reason of such suspension, consisting of:

ITEM I. The net profits on the business which is thereby prevented;

ITEM II. Fixed charges and expenses, only to the extent to which they would have been earned had no fire occurred, as follows: Salaries of indispensable employees, superintendents, executives, salesmen and employees under contract, taxes, interest, rents, royalties, insurance premiums, depreciation, advertising, special contracts, dues, subscriptions, directors' fees, accounting expenses, legal expenses and fees, light, heat and power, and such other fixed charges and expenses which must necessarily continue during a total or partial suspension of business." (Plf's Ex. B, R. 30, 31.)

The loss period covered by the policies is set forth, in paragraph 3 of the mimeographed part of the policies, as follows:

"3. It is a condition of this contract that the length of time of suspension for which loss may be claimed:

(A) Shall not exceed seventy-five per cent (75%) of 365 calendar days;

(B) Shall not exceed such length of time as would be required with due diligence and dispatch to rebuild, repair or replace such property herein described as may have been destroyed or damaged;

(C) Shall commence with the date of the fire and not be limited by the date of expiration of this policy." (Plf's Ex. B, R. 32, 33.)

On July 7, 1945, while these policies were in full force (R. 177) the sawmill and some appurtenant structures were completely destroyed by fire (R. 177), which suspended all sawmill operations, but continuance of logging operations was not suspended by the fire (R. 179), and the box shock mill was not directly damaged and it again became operable in a few days (R. 179).

At the time of the fire appellant had cut and on hand about 9,550,000 feet of logs, 4,000,000 feet of which were in the pond at the millsite and the remaining approximately 5,500,000 feet were lying on the ground where cut in the forest (R. 185, 186).

Paragraph 10, of the mimeographed portion of the policies, provided that:

“10. It is a condition of this insurance that as soon as practicable after any loss, the insured shall resume complete or partial operation of the property herein described, and shall make use of other property, if obtainable, if by so doing the amount of loss hereunder will be reduced, and in the event of the loss being so reduced such reduction shall be taken into account in arriving at the amount of the loss hereunder.” (Plf’s Ex. B, R. 35.)

In compliance with that provision of the policies and to get the approximately 5,500,000 feet of logs that were cut and still lying in the forests off the ground and into decks at the millsite, to arrest depreciation of them, appellant resumed logging operations a few days after the fire (R. 186, 187).

About July 12, 1945, appellant gave its order to Filer & Stowell, of Milwaukee, a large manufacturer of sawmill machinery, for the machinery for the new mill. The new mill was to have two band saws, or cutting sides, one larger than the other, and completion of the large side of the mill was promised by January 15th, or February 1st, 1946 (R. 184), and at about the same time appellant contracted with H. H. Larsen, a San Francisco contractor, to construct its new mill building and to have it ready to receive the new machinery as it arrived (R. 196).

The large side of the new mill would cut from 200,000 to 225,000 feet of lumber per day (R. 185) and, to provide enough logs to supply the contemplated partial operations of the new mill to the end of the nine months loss period under, and as required by, paragraph 10 of the policies, appellant decided to cut about six million feet more of logs (R. 186),¹ and actually commenced those logging operations on July 27, 1945 (R. 187).

¹Appellees’ reply (lines 9 to 14 of R. 91) admits that “it appeared that one side of the sawmill could be rebuilt and put into operation within less than nine months of the date of the fire, thus permitting partial operation of the sawmill within the term insured by the policy.”

To minimize depreciation on the logs to be cut, appellant moved the scene of its logging operations from the pine area, where it had been logging before the fire, to a fir area (R. 187), because it was obvious there would be more than normal delay in milling the logs (R. 188) and fir logs are not subject to as much depreciation as pine logs (R. 187), and they were then in the hot season and pine logs stain badly at that time of the year and "would be subject to terrible loss from depreciation" (R. 188).

The fir area was further from the central logging camp, where the loggers lived and where the trucks were kept at night, causing longer travel distances, and greater travel time, both for the men in getting to and from work and in trucking the logs to the logging railroad, resulting in less production per day; and the move necessitated additional expense in rehabilitating and extending the roads to and in the fir area before they could be used, and the operation, though to bring in a small amount of footage, required the same superintending and overseeing personnel as the normal maximum operation (R. 188, 189, 190), thus greatly increasing the cost per thousand feet of the partial logging operations.

On October 8, 1945, appellant received word that Filer & Stowell's employees had gone out on strike, and appellant ceased cutting logs on that day (R. 196). It had cut after the fire to that time slightly over 5,800,000 feet of logs (R. 190).

After the fire appellant brought in to the millsite 11,301,877 feet of logs (R. 190, 191), which were the approximately 5,500,000 feet of pine logs cut and on the ground at the time of the fire (R. 186) and the approximately 5,800,000 feet of fir logs that were cut after the fire (R. 190).

Appellant's fixed general logging overhead expense in the year preceding the fire (the agreed test year²) was \$5.31993 per thousand feet, mill scale, and, having, after the fire, produced to the millsite 11,301,877 feet of logs, mill scale, it, pursuant to the requirements of paragraph 10 of the policies, credited its claim, in its proof of loss (Plf's Ex. D), with recovered continuing fixed charges and expenses from the partial logging operations in the *gross* amount of 11,301,877 feet x \$5.31993, or \$60,125.19 (R. 191 and the proof of loss, Plf's Ex. D, p. 20, Sch. III, and p. 21, Sch. R-1).

Normally appellant's logging costs declined in mid-season, but in this case, because of the required moving of operations from the pine to the fir area, and the consequent factors above-mentioned, logging costs substantially increased (R. 193, 372, 373). Appellant's logging costs in the year preceding the fire were \$21.91339 per thousand feet but after the fire they were \$25.51592 per thousand feet, or \$3.60253 more per thousand feet (R. 192), and in its proof of loss (Plf's Ex. D,) it offset these extra logging costs against the *gross* recovery from partial logging operations in the sum of 11,301,877 feet x \$3.60253, or \$40,715.40 (R. 192; and the proof of loss, Plf's Ex. D, p. 22).

Appellant had to get these 11,301,877 feet of logs off the ground to minimize depreciation of them, and its mill pond was full of logs, so it had to put them in "decks"—

²Under cross-examination by counsel for appellees, Mr. Momyer, appellant's auditor, testified: "Q. And that was agreed, was it not, in the adjustment of the U. & O. loss, that the experience of the year—the fiscal year ending March 31, 1945, would be used as the base year for the purpose of calculating the use and occupancy loss? A. I believe that was agreed by all parties" (R. 246). * * * "Q. That was the assumption both parties used—the appraisers used all the way through this appraisal, wasn't it? A. Yes" (R. 253). * * * "A. I am using the test year that was agreeable to all concerned at the time. Q. You mean to the insurance companies? A. Yes, they didn't challenge the use of that test year" (R. 325). "The court (interrupting): He did not say they did not. He said both sides agreed on the test year" (R. 326). "Q. But it is a fact, is it not, that the test year which all parties agreed was to be taken as the basis for calculation, did show an overrun at the box factory, did it not? A. I am sure that is true" (R. 427).

stack them up like cord wood—³ but its decking yard was not large enough to accommodate so many logs and it was necessary for it to enlarge its decking yard and extend its logging railroad tracks thereto and therein and this cost it \$12,492.35 (R. 194), and in its proof of loss appellant offset this sum of \$12,492.35 against the *gross* recovery from partial logging operations.

The Filer & Stowell strike continued until April 1, 1946, and as a result the new mill machinery was not received and installed in the new sawmill until August 1, 1946, and the logs had to remain in decks, exposed to the weather, until that time (R. 196). It was obvious substantial depreciation had occurred in the logs (R. 197), and appellant could not make its proof of loss until it could determine how much depreciation had occurred in the nine months loss period after the fire (R. 197).

After the new mill became operable on August 1, 1946, to make the necessary test cuts, appellant told its problem to Western Pine Association, of Portland, Oregon, and it sent, about November 1, 1946, Mr. Lee Moffit and Mr. Henry Thomas, lumber experts, to make an analysis of the logs and the lumber they produced (R. 197, 198) and to determine the amount of depreciation that had occurred in the logs, and when it occurred (R. 368). Mr. Moffit “spot” selected from the decks a quantity of logs cut before the fire and a quantity of logs cut after the fire, 200,000 feet in all (R. 199), which were sawn under his supervision, and then analyzed by him for kind and extent of deterioration, and he then made the written report which is defendant’s Exhibit 1 (R. 207-210).

Mr. Thomas then made an analysis of that lumber to determine what part of the deterioration occurred in the insured period of nine months after the fire and what

³Appellees’ reply (lines 17 to 24, R. 91) admits “that defendant did cut additional logs after the fire and before such time as such operations would be halted by snow, and did haul logs from the woods which had resulted from cutting timber before the fire occurred, and did deck them at defendant’s plantsite, and that such decking did arrest deterioration, decay, check and depreciation of said logs already cut.”

part occurred thereafter, and he made the written report which is defendant's Exhibit 2 (R. 210-213).

These tests and analyses were made from November 1 to November 22, 1946 (R. 208). The insurance companies were invited to participate, but did not accept, saying they were not interested (R. 221, 222).

Mr. Momyer, appellant's auditor, received these reports and, following the findings and formula thereof, computed the dollar amount of the rot, stain, end check and like depreciation that had occurred, in the nine months loss period following the fire, on the 5,844,910 feet of logs cut after the fire, which amount was \$2,081.64 (R. 213, 214), and appellant, in its proof of loss (Plf's Ex. D, p. 22, Sch. III-R1) offset this sum of \$2,081.64 against the *gross* recovery from partial logging operations.

This produced the following summary of figures (R. 214, 215):

Gross recovery of fixed charges and expenses by partial logging operations after the fire of 11,301,877 feet x \$5.31993 per M feet,		\$60,125.19
Excess logging costs after the fire of 11,301,877 feet x \$3.60253 per M feet, or	\$40,715.40	
Extra decking expense	\$12,492.35	
Depreciation on 5,844,910 feet of logs cut in partial logging operations after the fire	\$ 2,081.64	\$55,289.39
Leaving a net partial logging operations credit against the claim of		\$ 4,835.80

Mr. Momyer then, following the findings and formula of the Moffit and Thomas reports (Defendant's Ex. 1, R. 207, and Defendant's Ex. 2, R. 210) computed the dollar amount of the rot, stain, end check and like depreciation that had occurred, in the nine months loss period

following the fire, on the 9,550,656 feet (R. 185) of logs that were cut before, and on hand at the time of, the fire, and claimed it in Schedule D-8, on page 17, of the proof of loss, as "depreciation" insured under "ITEM II" of the policies, in the resulting amount of \$36,149.95 (R. 213).

We now turn to the subject of the box shook mill operations after the fire.

Appellant had produced and on hand at the time of the fire 8,828,614 feet of lumber suitable for cutting into box shook (R. 216). It had not produced this lumber for sale as lumber, and never offered it for sale, and it was not for sale, as lumber, but appellant had produced and held it for the supply of its box shook mill for cutting into, and sale as, box shook.⁴

Because of our government's great need for shipping crates, or boxes, in the war, it undertook to encourage the production and sale of box shook and to discourage the sale of box lumber, as lumber, by setting OPA ceiling prices at a high figure for box shook and at a very low figure for box lumber,⁵ and as a result box lumber could

⁴Mr. Momyer testified, at R. 215: "Q. And now, had Pickering Lumber Corporation produced that lumber itself? A. It had. Q. And for what purpose had it produced the so-called box lumber? A. For the use in a box factory, produced box shook. Q. Did it ever offer to sell that lumber as lumber? A. It did not. Q. And, of course, didn't sell it as lumber? A. No, sir. Q. You ran it through the box factory? A. That is right." At R. 216, he testified further: "Q. Did Pickering Lumber Corporation ever produce for sale, or offer to sell as far as you know, that type of lumber called box lumber? A. We did not."

⁵Mr. Momyer testified, under cross-examination by counsel for appellees (R. 390, 391): "Q. Now, Mr. Momyer, it was later, then, was it not, that the government decided to encourage the production of box shook, that is, the manufacturing process that took place, at the box factory, because of the fact that, as I believe is alleged at great length in the Pickering answer, that the shook was needed for shipment overseas, and that was after the OPA prices were fixed, wasn't it? A. I am sure it was. Q. In order to accomplish that result the government raised the ceiling on box shook, did it not? A. Yes, sir." At R. 442-443, appellees' witness Rodolph testified: "Q. Do you recall when it was that the raise in shook prices came about, about 1942? A. First of all, the shook prices were relatively low, and along in October or November of 1943, the OPA added table 3A to the price list which in itself raised the shook prices considerably. Q. Yes. And during the period of time during 1942 and 1944, did the OPA ceiling price of box lumber go up or down? A. They went up. Q. How much? A. About \$3.00 per thousand feet. Q. In other words very little in

not be purchased at OPA ceiling prices.⁶

The box shook mill was not directly damaged (R. 178) and, in compliance with the requirements of paragraph 10 of the policies, its operations were resumed within a few days after the fire, for the benefit of the insurance companies (R. 217), and continued until the supply of box lumber was exhausted (R. 179), about March 16, 1946 (R. 221).

In that period the 8,828,644 feet of box lumber was run through the box shook mill and produced 8,636,974 feet of shook (R. 216), which was promptly sold for \$60.22 per thousand feet.

comparison with the raise in ceiling prices of shook? A. That's correct."

On cross-examination, Mr. Rodolph testified, at R. 457: "Q. Now, of course, we had very abnormal conditions in the lumbering industry, and particularly in the box shook end of it, during OPA prices and the duration of the war, didn't we? A. Yes. Q. And there was a great demand on the part of the government for boxes, was that not true? A. Yes." And further (R. 458): "Q. Now there were great scrambles during the period of the latter years of the war, especially existing in 1945, for people trying to get lumber to make boxes or box shook, wasn't there? A. For all lumber, yes."

Appellees' reply admitted (lines 3 to 16, R. 96), "that the United States government placed OPA ceiling prices on box shook which would permit the sale of box shook at a good profit, and that generally other grades of lumber could not be sold at prices which would realize as great a profit as could be realized by the manufacture and sale of box shook; that during the entire 9-month period following the fire, lumber to be used for the manufacture of box shook was of greater value to defendant than lumber to be sold after it had passed through the sawmill and the planing mill because under OPA ceiling prices a greater profit could be made upon the lumber manufactured into box shook."

⁶Mr. Momyer testified (R. 215, 216): "Q. * * * I believe this is covered by the pleadings, but I want to cover it briefly, was it possible to buy box lumber at the time of or following the fire at OPA ceiling prices? A. It was not possible." He further testified (R. 251) that he felt Pickering should not have to use all its box lumber in partial operations after the fire "because it could not be replaced," and that it "could not be purchased on the market."

This is admitted by lines 9 to 15 of paragraph 11 of appellees' reply (R. 95) as follows: "Except that plaintiffs admit that the United States was at war with the governments of Germany and Japan; and as to the allegation contained in the second sentence about the middle of page 17, reading 'Such lumber could not be bought in the market or for the prices which might lawfully be paid under OPA regulations.'"

Mr. Herrick testified (R. 547): "Q. Do you remember there was evidence to the effect that Pickering couldn't have bought the lumber that went to the box factory at OPA ceiling prices? A. Yes. Q. Did the appraisers question that testimony? A. No, not only did the appraisers not question it, but it was within their general knowledge. Q. They knew that was a fact? A. Yes."

Appellant's costs for its lumber to the "diversion point" (the green sorter behind the sawmill where the lumber is sorted and roughly classified) were the same on all the number it produced,⁷ that cost was \$37.39 per thousand feet (R. 282, 283), its cost for treating, handling and transporting the box lumber to the box shook mill was \$2.41 per thousand feet, and hence the cost of that lumber to the box mill door was \$39.86 per thousand feet,⁸ its costs for sawing the lumber into the shook were \$11.65 per thousand feet, its shipping costs were 97c per thousand feet, and the under-run (waste) amounted to \$1.03 per thousand feet (R. 217, 218).

This produced the following summary of figures (R. 217, 218):

Cost for the box lumber			
to box mill door	\$39.86	per M	
Cost of sawing into shook	11.65	" "	
Shipping costs	.97	" "	
Under-run	1.03	" "	
	<hr/>		
Total Cost	\$53.51	" "	
Total Realization			\$60.22 per M
Profit	\$ 6.71	" "	
	<hr/>		
	\$60.22		
\$6.71 x 8,828,644 feet (all credited to the insurance companies) \$59,240.93.			

⁷Mr. Momyer testified (R. 263): "To demonstrate, starting with the logs in the woods, all grades of lumber are in one package in the form of a tree. For the wood you cut in that tree you pay so much a thousand for the cutting of the tree regardless of how many grades are involved in that tree. You pick that log up and load it on a car and bring it down to the mill, still in one package, you send it through the saw and you get various grades of lumber from that log. But I defy anyone to show that one board in that log costs you more than another board in the log, regardless of what it sells for."

⁸Mr. Momyer testified (R. 217): "Q. And now, in constructing your claim, the proof of loss, would you tell us how it was done? A. We first took the cost of 8,828,644 feet of lumber, used in the box factory, that was \$39.86 per thousand feet, and to this added the cost of manufacture in the box factory, the work of processing the lumber through the box factory unit, that was \$11.65. * * *, and the shipping expense, \$.97 per thousand, and then because we didn't get the full 8,828,644 feet in shook, we had an under-run of 191,670 feet to figure down to 8,636,794 produced in box shook, that cost \$1.03 per thousand * * * that adds up to a total then of \$53.51 per thousand to get the lumber through the box factory, and loaded on the car, and sold."

In the proof of loss (as shown, in detail, at p. 21, Sch. R-2 III, and, in summary, at p. 20, Sch. R-3 II), the insurance companies were given full credit for this sum of \$59,240.93 as profits earned from operation of the box shook mill after the fire (R. 218).

On March 22, 1946, appellees made an advance payment to appellant of \$250,000.00 (R. 163), the amount paid by each appellee is shown in Column "C" of Plaintiff's Exhibit "C" (R. 48).

On January 4, 1947, appellant filed its proof of loss (Plf's Ex. D, R. 164). On January 27, 1947, appellees delivered to appellant an instrument claiming defects in the proof of loss and requested verified amendments, and on February 6, 1947, appellant replied to that request by an instrument entitled "Reply Affidavit" (R. 165), which is in evidence as plaintiff's Exhibit E.

The printed portion of the policies (Plf's Ex. A) contained the following provisions (R. 24, 25):

"ASCERTAINMENT OF AMOUNT OF LOSS.
This company shall be deemed to have assented to the amount of loss claimed by the insured in his preliminary proof of loss, unless within twenty days after the receipt thereof, or, if verified amendments have been requested, within twenty days after their receipt, or within twenty days after the receipt of an affidavit that the insured is unable to furnish such amendments, the company shall notify the insured in writing of its partial or total disagreement with the amount of loss claimed by him and shall also notify him in writing of the amount of loss, if any, the company admits on each of the different articles or properties set forth in the preliminary proof or amendments thereto.

If the insured and this company fail to agree, in whole or in part, as to the amount of loss within ten days after such notification, this company shall forthwith demand in writing an appraisement of the loss or part of loss as to which there is a disagreement and shall name a competent and disinterested appraiser, and the insured within five days after receipt of such demand and name, shall appoint a competent and disinterested appraiser and notify

the company thereof in writing, and the two so chosen shall before commencing the appraisal, select a competent and disinterested umpire.

The appraisers together shall estimate and appraise the loss or part of loss as to which there is disagreement, stating separately the sound value and damage, and if they fail to agree they shall submit their differences to the umpire, and the award in writing duly verified of any two shall determine the amount or amounts of such loss.

The parties to the appraisal shall pay the appraisers respectively appointed by them and shall bear equally the expense of the appraisal and the charges of the umpire.

If for any reason not attributable to the insured, or to the appraiser appointed by him, an appraisal is not had and completed within ninety days after said preliminary proof of loss is received by this company, the insured is not to be prejudiced by the failure to make an appraisal, and may prove the amount of his loss in an action brought without such appraisal."

On February 10, 1947, appellees sent to appellant a notice advising that they disagreed with the amount of loss claimed in the proof of loss (R. 166). The parties failed to agree, within ten days thereafter, upon the amount of the loss (R. 166). On February 21, 1947, appellees, pursuant to the above-quoted appraisal provisions of the policies, demanded in writing an appraisal of the loss and named Mr. Frank Maloney, of Sacramento, as appraiser (R. 166). Appellant, as required by the appraisal provisions of the policies, named an appraiser—Mr. Anson Herrick, of San Francisco, and advised appellees thereof (R. 166), and the two selected Mr. Lewis Lilly, of San Francisco, as umpire (R. 166).

Appellant requested the appraisers to hold hearings and to give notice of the time and place thereof (R. 290). Pursuant to notice (R. 293), the appraisers held hearings, at San Francisco, on March 26 and 27, 1947 (R. 294).

At the hearings Mr. K. W. Withers and Mr. W. N. Ball, representing appellees (R. 223), presented to the

appraisers a brief entitled "Memorandum to Appraisers" (Def't's Ex. 3, R. 223), pointing out to the appraisers that the proceedings before them were "not a legal procedure nor arbitration," and cautioning them that they were "not authorized to interpret contract or to deal with the legalities of the contract," and that "should there be questions involved as to coverage, extent of liability, or the applications of the terms of the contract, the award as to values and loss should be in such form and detail that either interpretation of the contract or liability could be applied."⁹

On May 2, 1947, the appraisers made their report entitled "Award and Other Findings of the Appraisers" (R. 167).¹⁰

⁹The opening paragraph of which reads: "*The conduct of an appraisal under the policies held by the Pickering Lumber Corporation is not a legal procedure nor arbitration. It is a special provision under the policy in which the appraisers are authorized only to determine the amount of loss sustained and the values of the subject of insurance without reference to the question of liability or extent of liability for such items of loss. There can be no objection to the appraisers being furnished with, having, or obtaining any information or reference which they might wish in their deliberations in determining values, and loss sustained, but they are not authorized to interpret contract or to deal with the legalities of the contract. Should there be questions involved as to coverage, extent of liability, or the applications of the terms of the contract, the award as to values and loss should be in such form and detail that either interpretation of the coverage or liability could be applied. * * **" The next to the concluding paragraph said: "*Should it be found that a legal question of coverage or extent of liability is involved, the appraisers award should be sufficiently detailed so that either legal construction can be applied. As previously stated, the appraisal vests authority only to deal with matters of value and loss.*" (Italics supplied.)

¹⁰The award appears at P. 168 of the Record and, omitting caption and signatures, is as follows:

"The undersigned, Frank Maloney and Anson Herrick, duly appointed as appraisers, respectively, by Fire Companies' Adjustment Bureau, Inc., on behalf of the insurers, and the insured, and the undersigned Lewis Lilly, duly selected by the said appraisers as umpire, all under the provisions of the California Standard Form Fire Insurance Policy relating to the ascertainment of amount of loss, after consideration of all facts and arguments presented at a hearing held in San Francisco on March 26 and 27, 1947; the arguments presented in an undated brief filed on behalf of the insured by its counsel; of arguments contained in an undated memorandum and in a letter dated April 4, 1947, of the insurers; and of other information and data properly obtained by the appraisers, find as follows:

- (1) The net profits prevented and fixed charges and continuing expenses during the period July 8, 1945, to April 7,

Application of the contribution clause of the policies (Paragraph 4 of the mimeographed attachment to the policies—R. 33) to the figures in the report of the appraisers produced an aggregate amount payable to appellant of \$491,378.41 (R. 171), and the portion thereof allocable to each of appellees, less the advance payment, is shown in column “B” of Plaintiff’s Exhibit “C” (R. 48). These amounts were tendered to appellant, which tenders appellant refused to accept, saying it intended to contest the validity of the award (R. 171).

Appellees then commenced this action on June 13, 1947, in the District Court of the United States for the Northern District of California, Southern Division, as heretofore stated.

By agreement of the parties at the trial, the depositions of the appraisers, Mr. Herrick and Mr. Maloney, and of the umpire, Mr. Lilly, taken in the case, were received in evidence in lieu of producing them as witnesses (R. 297, 298).

The figures presented to the appraisers by appellees were the same as contained in appellant’s proof of loss¹¹

1946, reduced by profits realized and fixed charges and continuing expenses recovered by partial operation following the fire amounted to *Five Hundred and Eighty-One Thousand Dollars (\$581,000)*.

- (2) The net profits prevented and charges and expenses which would normally have been earned during the period of twelve months immediately following the fire amounted to *One Million and Thirty Thousand Dollars (\$1,030,000)*
- (3) The expenses incurred by the insured, other than those constituting costs of partial operations, for the purpose of reducing the loss under this policy amounted to *Seventeen Hundred and Sixty Dollars (\$1,760)*, which amount does not exceed the amount in which the loss was so reduced.

In reaching such findings the appraisers or the umpire did not find it necessary to resolve any legal question of coverage or extent of liability.”

¹¹At R. 500, Mr. Herrick testified that the appellees’ accountant, Mr. Frank Baker, “used the data shown by the proof of loss, and with certain modifications of factors that entered into it, and by the adoption of different principles of allocation, came to a different result.” At R. 501, Mr. Herrick testified: “I have no recollection that he disputed any of the amounts as shown by the proof of loss * * * with the possible exception—you might call it a dispute—the amount considered as the cost of depletion. * * * And that I don’t think should really be called a dispute. It was merely the adoption of a different figure on a different theory.”

Mr. Maloney testified, at R. 601: “Q: I will ask you if you remem-

and it was agreed by all the parties that these figures were the only figures necessary for the appraisers to consider¹².

As to the matters of excess logging costs after the fire, expense of extending the decking yard and the logging railroad tracks therein, and of decking logs after the fire, the appraisers accepted the figure of \$42,797.04 shown in the proof of loss as the extra logging costs after the fire¹³. They also accepted the figure of \$12,492.35 shown in the proof of loss as the extra expense in decking

ber, there was no actual difference in the actual figures taken from the books in either those presented by Pickering in its proof of loss or in Baker's, is that right? It was a difference in handling? A. Just the difference in setup primarily. Q. That is, they came to different conclusions? A. Yes. Q. But there was no dispute about the accuracy of the figures they used? They used the same figures, did they not? A. I feel sure that they did. Q. Was that the reason that you did not believe it necessary to go and examine Pickering's books? A. That's right."

¹²Mr. Herrick testified on cross-examination, at R. 562, 563: "Q. Is it your recollection that it was agreed to by both parties that the data which was in the possession of the appraisers in the form of the original claim and the various analyses by accountants on both sides, the testimony and other information given, was all that was necessary for the appraisers to consider in reaching their award? A. Right."

¹³Mr. Herrick testified, at R. 532, 533: "Q. The excessive logging costs, \$42,797.04, is found in the proof of claim, isn't it? A. That's right. * * * Q. And the excessive logging costs were figures that appeared on page 22 of the proof of claim, were they not? * * * A. Yes, you are right. Q. Did the appraisers attempt to find out whether there was anything wrong in the figures used for making up that schedule, or was that accepted? A. I think the appraisers accepted the figures as shown by the—on page 24, which was the basis for the computation of the claim on page 22. Q. On page 22. That is more accurate. They accepted the figures on page 24 which resulted in the calculation on page 22? A. That's right." (Page 24 of the proof of loss shows the detail of the extra logging costs and page 22 of the proof of loss shows the summary calculation of those extra logging costs.)

Mr. Maloney testified, at R. 608, 609: "Q. You don't remember whether or not they accepted the figures as to the actual amount of excess logging costs? A. Of what? Q. Of excess logging costs? I am not talking about whether they accepted the idea that it should be allowed, but whether they thought the books properly recorded the amount of excess logging costs? A. To the best of my knowledge, neither Mr. Lilly nor Mr. Herrick, who were going into Pickering's books, ever questioned the books at any time, as to their accuracy." (Then Mr. Maloney added in longhand, just before the deposition was filed at the trial, the following: "This does not mean that I accept this figure of excess logging cost used by Pickering. I did not.") "Q. You didn't go into that feature of it? A. I couldn't. Q. What? A. I would get lost. Q. I say you did not? A. No. Q. You had to rely upon them for that? A. I definitely relied on Mr. Herrick and Mr. Lilly. Q. As to the accuracy of the figures? A. That's right."

the logs after the fire¹⁴, and they accepted the figure of \$36,149.95 shown in the proof of loss as the amount of decrease in value of logs in the nine months loss period after the fire¹⁵, but they did not agree as to the allowability of these three items¹⁶ because they did not accept appellant's theory that those items were insured by the policies¹⁷. The insurance companies denied all liability for the excessive logging costs¹⁸, and there was a dispute between the appraisers as to whether these items should be allowed¹⁹. The appraisers were of the view that inasmuch as appellant still had the logs on hand it should absorb the extra logging costs after the fire, and, by milling the logs, would, in the long run, recover its full cost

¹⁴Mr. Herrick testified, at R. 536: "Q. Well, now, the log decking, \$12,492.35, as I understand it, that is the figure that Pickering claimed? A. That's right. Q. And that is the figure shown by the figures that they had in their proof of claim? A. That's right. Q. Did the appraisers question the accuracy of the figures as to how much expense there was for log decking? A. No."

¹⁵Mr. Herrick testified, at R. 533: "Q. * * * was there any evidence introduced at all as to the amount of that log stain that would have occurred within nine months? A. Very complete evidence on the part of Mr. Moffett." And, at R. 535, 536, Mr. Herrick continued: "Q. Did the appraisers come to the conclusion that the testimony was wrong, or was that what the trouble was? A. No. Q. That was not the trouble? A. That was not the trouble. * * * The question of the accuracy of the computation of those figures was not raised."

¹⁶Mr. Herrick testified, R. 541: "Q. That was the part you couldn't agree on, as to whether it was— A. The two things: The excessive logging costs and the stain. Q. And the decking? A. And the decking. Q. Three things, really? A. Yes."

¹⁷Mr. Maloney testified, at R. 608: "Q. But you did not accept the theory that it ought to be allowed for the reasons that you have mentioned? A. That's right."

Mr. Herrick testified, at R. 536: "Q. * * * the accuracy of the figures that I have just been talking about was not the thing that caused discussion for days? A. No. Q. What was it that was the cause of the discussion? A. The question as to the allowability of it at all."

¹⁸Mr. Herrick testified, at R. 532: "Q. The excessive logging costs, \$42,979.04, is found in the proof of claim, isn't it? A. That's right. Q. And the insurance companies denied any liability for it at all * * *? A. They denied any liability at all."

¹⁹Mr. Herrick testified, at R. 537: "Q. Was there a dispute between the appraisers as to whether these things should be allowed at all or not? A. Yes."

for them²⁰, and also took the position that the depreciation on the logs in the nine months loss period after the fire was "deterioration" and not depreciation within the meaning of that term as used in, and insured by, the policies²¹, and there was much discussion between the appraisers upon "the question as to the allowability of it (these claims) at all." (R. 70 of Herrick's Deposition.) And finally the appraisers, without making any kind of computation and without finding the amount of these items²² and without submitting the matters to the umpire²³, agreed upon an arbitrary lump sum compromise allowance of \$25,000.00 for these items aggregating \$91,439.34²⁴.

²⁰Mr. Herrick testified, at R. 538, 539: "Q. Was it your idea that a part of the cost after the fire went into logging, and they still had logs on the way, and for that reason they should absorb this cost? Was that the idea? A. Why, that is fundamental, Judge. Q. Well, am I right? A. Certainly, you are right on that."

Mr. Maloney testified, at R. 604: "Q. Do you remember what was done with that; whether it was allowed or not? A. No, not—as a single individual item, it was not. Q. Do you remember why it was not? A. There was a great deal of discussion in regard to the excessive logging costs; and the values to them; and that there should be some recovery, but they would be benefitted by it in the longer run."

²¹Mr. Herrick testified, at R. 540: "A. The so-called log stain was designated in the claim as depreciation; and if you will pardon me for saying so, Judge, that was not true. It was not a depreciation as the term is understood. It was deterioration, which was not a continuing expense. If allowable, it would be what we call expediting expense. And if allowable as an expediting expense, would not have been controlling in my opinion under the co-insurance provision."

²²Mr. Herrick testified, R. 537: "Q. * * * Well, was the \$25,000.00 a figure that was arrived at by any kind of computation? A. No."

²³The umpire, Mr. Lilly, testified, at R. 579, 580: "Q. * * * Those were the three items that you arrived at the twenty-five thousand, is that right? A. I imagine those were the items included? Q. Were you in on that decision? A. I don't think that I was—that there was a final joining of issue. I think that was agreed upon by the—I am speaking from memory—I think the appraisers agreed on that figure; and it was agreeable to me." And, at R. 580, he testified: "Q. You think they worked that out between themselves? A. To the best of my knowledge, that was it, yes."

²⁴Mr. Herrick testified, at R. 537: Q. *Was it arrived at by agreement?* A. Yes. Q. *Was there a dispute between the appraisers as to whether these things should be allowed at all or not?* A. Yes. Q. *Is that what resulted in the agreement?* A. Yes. Q. *Was it a compromise?* A. You might call it—, Yes, I think you would call it a compromise."

Mr. Maloney, referring to a sheet containing these items, with a bracket around them, and \$25,000.00 written at the side in Mr. Herrick's handwriting, testified, at R. 605: "That means that we allowed \$25,000.00 for the first 4 items on the sheet * * *." (Italics supplied.)

As to the costing of appellant's box lumber into the box shook mill in partial operations after the fire, the appraisers used OPA ceiling prices²⁵, because "it was the price that the law prescribed"²⁶. Mr. Herrick thought that the box lumber, being at the box mill for manufacture into shook, should carry a higher than OPA price for box lumber, but Mr. Maloney took the opposite view, and the matter was submitted to the umpire, Mr. Lilly, who agreed with Mr. Maloney on the use of OPA prices²⁷.

²⁵Mr. Herrick testified, at R. 545: "A. The profit for the box factory was arrived at by taking *the constructed market price for the lumber* that was converted into shook, and the expenses of operating the box factory, and deducting the aggregate from the proceeds of the shipments. * * *" And, at R. 545, he testified: "A. *The constructed market price was the so-called legal price at which the lumber could have been sold—that is, the lumber which was converted into—through the box factory—could have been sold as lumber*, plus the most advantageous freight differential. Q. Which, by the way, was a part of the OPA price, wasn't it? A. No, the OPA prices were on a basing point of Susanville; and there was added to the OPA the freight from Susanville to the point of destination, less the actual freight from Standard to the point of destination. Q. * * * if they had sold under OPA, they would have been permitted to sell it that way, wouldn't they? A. Yes. Q. In other words, the OPA prices being based at Susanville, if you could sell at places where the freight was less than that, you actually could make that freight differential by selling under the OPA? A. Yes."

Mr. Maloney testified, at R. 612: "Q. *Well, do you know how you arrived at it?* A. *Oh, yes, we used the OPA ceiling price, plus the freight differential.* Q. So the OPA ceiling price allowed the freight differential, didn't it? A. No, we used the OPA ceiling price plus the freight differential. Q. But the OPA regulations provided for that, didn't they? A. Oh, sure they did. Q. *So you were actually using OPA ceiling prices for that?* A. *That's right.* But we added a very favorable freight differential." (Italics supplied.)

²⁶Mr. Maloney testified, at R. 613: "Q. *Then why did you use the OPA?* A. *Standard price. The known price. It was the price that the law prescribed,* and Mr. Herrick and Mr. Lilly stated that was the proper accounting practice." He further testified, R. 614: "Q. *It was what had been established by the government?* A. *Right. That is what we worked our price from.* Q. *Was that the only consideration?* A. *That's right, as far as the price base was concerned.* Q. *There wasn't any other?* A. *Not to my knowledge.*"

Mr. Herrick testified, at R. 548: "Q. * * * Then explain to me why you used OPA ceiling prices? A. *Because those were the only prices of which we had knowledge at which the lumber could have been sold as lumber.*" (Italics supplied.)

²⁷Mr. Lilly testified, at R. 583: "I think there were two views there, as I recall; Mr. Herrick had one view, and asserted one view to the effect that he thought the material being there should carry a higher price than OPA prices; *and Mr. Maloney said— * * * I think took the opposite viewpoint, that the OPA price was the price to be used.* Q. *Do you recall, in regard to that, making the decision?* A. *I think I acquiesced in the OPA price plus the agreed upon freight differential.* I think that freight differential was Fresno and Merced or Fresno and Modesto; I can't tell which." (Italics supplied.)

The appraisers assumed a theoretical sale, under OPA prices, of one-half the box lumber for Merced, California, delivery, and the other one-half for Fresno, California, delivery, and averaged the freight salvage from the basing point of Susanville to the assumed delivery points of Merced and Fresno, and added that averaged freight salvage to the basic OPA price²⁸. The appraisers recognized that the OPA ceiling prices on box lumber were less than appellant's cost for producing the lumber²⁹, and they recognized that appellant could not have purchased the box lumber at OPA ceiling prices³⁰ and they did not use those prices on the theory that appellant could have purchased the lumber at that cost, but upon the theory that appellant could not lawfully have sold that lumber on the market, as lumber, for a higher price³¹.

We now turn to the action of the appraisers in adding to annual values depreciation on the destroyed sawmill for the year after its destruction by fire.

Paragraph 4 of the mimeographed attachment to the policies (Plf's Ex. B) provides (R. 33):

"4. 'CONTRIBUTION CLAUSE'—It is expressly stipulated and made a condition of this contract that, in the event of loss, this company shall be liable for

²⁸Mr. Herrick testified, at R. 546: "*A. The constructed market price which was used was based on the sale—I think for half the quantity at Modesto for Merced delivery, at which point it would have given the company the greatest return; and the other half at Fresno, which gave it a little less return, and it was averaged out.*" (Italics supplied.)

²⁹Mr. Herrick testified, at R. 546, 547: "A. * * * it was completely recognized that the OPA prices on the quality and the grade of lumber that went through the box factory was less than the average cost of all lumber produced."

³⁰Mr. Herrick testified, at R. 547: "Q. Do you remember that there was evidence to the effect that Pickering couldn't have bought the lumber that went to the box factory at the OPA ceiling prices? A. Yes. Q. Did the appraisers question that testimony? A. No, not only did the appraisers not question it, but it was within their general knowledge. Q. They knew that was a fact? A. Yes."

³¹Mr. Herrick testified, at R. 547: "Q. Then you didn't take OPA prices on the theory that Pickering could have actually paid that? A. Yes, that is right. Q. You only considered it in the light that they would not have been able to sell it at any higher price? A. That's right. Q. If they had sold, that would have had to be out on the market? A. That's right."

no greater proportion thereof than the amount hereby insured bears to seventy five per cent (75%) of the total of the net profits (ITEM I) and charges and expenses (as specified in ITEM II), which would normally have been earned during the period of twelve (12) months immediately following the fire."

In computing profits prevented, appellant in its proof of loss deducted, both in the nine months period column and in the one year period column, the amount of depreciation that had occurred on the (burned) sawmill in the agreed test year—the year preceding the fire³² (R. 418).

The appraisers added to annual values in the year after the fire the sum of \$15,042.00 as depreciation on the destroyed sawmill in the year after its destruction by fire³³. They also originally added three-fourths of that amount to the values for nine months after the fire, but later took that sum out³⁴.

Further detailed facts, as material, will be stated in the argument.

³²See footnote No. 2 on page 8 hereof.

³³Mr. Herrick testified, at R. 517, 518: "Q. How much more? A. \$15,095.00. Q. Can you account for that? A. With the exception of \$53.00, it constituted the depreciation on the destroyed property which had been omitted in part from the claim." He further testified, at R. 518: "Q. In other words, in fixing the amount of fixed charges and continuing expenses for the entire year, you added depreciation on the property that had been destroyed? A. That's right."

³⁴Mr. Herrick testified, at R. 518: "Q. Did you add any part of that into the fixed charges and continuing costs for the nine months? A. Yes. Q. Is that the one that you say later was eliminated? A. Can this be off the record? A. Yes. * * * Q. Look at page 4, item 6, 'Elimination of item included in 4.' What is that? A. The item of \$11,178.00 mentioned as a part of item 4 on page 4 of the statement represents the inclusion within fixed charges and continuing expenses of the proportionate part of this depreciation applicable to the loss period, which was subsequently taken back as a recovery item." And, at R. 520, Mr. Herrick testified: "Q. But that while you put it in, you took it out again? You ultimately didn't allow it in the schedule on the ground that it didn't occur? A. That is correct. Q. In other words, because the policy says 'would normally have been earned,' in making the twelve months calculation you did not do it on the same basis that you did on the nine months? A. That's correct. Q. One was what it would have been, and the other was what it actually was? A. That is correct."

SPECIFICATION OF ERRORS RELIED UPON.

I. The court erred in holding, contrary to all the evidence, that the provision for appraisement in the policies authorized, and that the parties contemplated and intended, that the appraisers should interpret and construe the policies and decide such and other questions of law, with finality.

II. The court erred in holding that the fact that the appraisers "considered" the excess logging costs, the decking expense and the log depreciation, aggregating \$91,439.34, and made a lump sum compromise allowance thereon of \$25,000.00, constituted a proper discharge of their duties under the submission.

III. The court erred in holding that the appraisers did not exceed, but properly discharged, the submission in rejecting appellant's actual cost, and in substituting OPA ceiling prices, for the lumber put through the box shook mill after the fire.

IV. The court erred, as a matter of law, in holding that the appraisers properly added to annual values unreal depreciation on the destroyed sawmill for the year following its destruction by fire.

ARGUMENT.

I.

The court erred in holding, contrary to all the evidence, that the provisions for appraisement in the policies authorized, and that the parties contemplated and intended, that the appraisers should interpret and construe the policies and decide such and other questions of law, with finality.

The district judge said in his opinion:

“* * * if the questions of accountancy or law were implicit in or incidental to such determination it was the clear intent of the provisions for reference in said policies that the referees should make such determinations, whether they were appraisers or arbitrators” (P. 4 of Op.). And that “The referees were required to decide upon the amount *due the defendant under the policies*” (P. 10 of Op.). And, “Furthermore, as heretofore stated the very nature of the questions to be submitted to the referees *by the terms of the policies* indicated that it was contemplated by and the intent of the parties that the referees *should pass upon any subject that was implicit in or incidental to such determination*, including questions of accountancy or law, whether they be called appraisers or arbitrators. Accordingly *if in determining these questions they were required to construe the policies or settle questions of law they were acting within the scope of the submission*” (P. 14 of Op.). (Italics supplied.)

It is expressly found, in Finding XVIII (R. 136), that:

“It is true that the referees undertook to construe certain provisions of said policies; in each instance where they did so, however, it was necessary that they do so in order to arrive at an award, and such construction of the policies by the referees was implicit in and incidental to the determination of the questions submitted to them for decision and award; it was the clear intent of said policies and it was contemplated by and was the intent of plaintiffs

and defendant that the referees should pass upon and determine with finality any question of the construction of the policies implicit in or incidental to the making of an award; * * *."

These holdings set forth the basic and vital error committed by the court.

The only agreement for appraisal that existed between the parties was that contained in the printed portion of the policies (Plf's Ex. A), which is precisely in the form designed, for policies of direct fire insurance—not use and occupancy insurance—, by the California fire insurance policy form statute (Secs. 2070, 2071, California Ins. Code, 1937). That agreement provides for "an appraisalment of the loss" by an "appraiser" to be named by the insurers and an "appraiser" to be named by the insured and an "umpire" to be named by them, and the "appraisers" were to "estimate and appraise the loss" and state "separately the sound value and damage," and if they failed to agree they were to "submit their differences to the umpire."

Those appraisal provisions were at once the source and the limit of the appraisers' authority, *Continental Ins. Co. v. Garrett*, 125 F. 589, 590 (6th Cir.)³⁵. The question of what matters the appraisers were authorized to consider and determine depends entirely upon the intention of the parties, to be ascertained by the same tests that are applied to contracts generally, *Marchant v. Mead-Morrison Mfg. Co.*, 252 N. Y. 284, 169 N. E.

³⁵In this leading case Judge, later Justice, Lurton said on this point:

"The agreement under which the appraisers were selected *was at once the source and limit of their authority*, and the award, to be binding, must, in substance and form, conform to the submission. The submission required the appraisers to determine two things, and two things only, for the submission was only for the purpose of determining the amount of loss, and no other defense open to the insurer was submitted." (Italics supplied.)

386, 391³⁶; and the empowerment of third parties to interpret contracts and to resolve such and other questions of law, with finality, thus ousting the normal functions of the courts, requires an agreement so saying in clear and unmistakable terms, and such powers never can be implied. *U. S. v. Moorman*, 338 U. S. 457, 462, 70 S. Ct. 288³⁷, *Mercantile Trust Co. v. Hensey*, 205 U. S. 298, 309, 27 S. Ct. 535³⁸, *Continental Milling & Feed Co. v. Doughnut Corporation of America.*, 186 Md. 669, 48 A. (2d) 447, 450³⁹, *Fernandez & Hnos v. Rickert Rice Mills*, 119 F. (2d) 809, 815 (1st Cir.)⁴⁰, and *Jacob v. Weisser*, 207 Pa. 484, 56 A. 1065, 1067⁴¹.

³⁶In this leading case, Judge, later Justice, Cardozo said on this point.

*"The question is one of intention, to be ascertained by the same tests that are applied to contracts generally. * * * No one is under a duty to resort to these conventional tribunals, however helpful their processes, except to the extent that he has signified his willingness. Our own favor or disfavor of the cause of arbitration is not to count as a factor in the appraisal of the thoughts of others."* (Italics supplied.)

³⁷Where the court, in considering a dispute under a government war contract that expressly gave to the Secretary of War the power to determine "all claims by a contractor," said:

"It is true that the intention of the parties to submit their contractual disputes to final determination outside the courts should be made manifest by plain language." (Italics supplied.)

³⁸Where the court said on this Point: "To make such a certificate conclusive requires plain language in the contract. It is not to be implied." (Italics supplied.)

³⁹In this case the court, after quoting Judge Cardozo's language in the *Marchant* case, *supra*, saying that "the question is one of intention," said:

"Sound policy demands that the terms of an arbitration must not be strained to discover power to pass upon matters in dispute, but the terms must be clear and unmistakable to oust the jurisdiction of the court, for trial by jury can not be taken away in any case merely by implication." (Italics supplied.)

⁴⁰In this case the court said: "A party is never required to submit to arbitration any question which he has not agreed so to submit, and contracts providing for arbitration will be carefully construed in order not to force a party to submit to arbitration a question which he did not intend to be submitted." (Italics supplied.)

⁴¹Where the court said: "But, under any circumstances, before the decision of an arbitrator can be final and conclusive, it must appear, as was said in *Chandley Bros. v. Cambridge Springs*, 200 Pa. 230, 49 Atl. 772, that power to pass upon the subject-matter is clearly given to him. 'The terms of the agreement are not to be strained to discover it. They must be clear and unmistakable to oust the jurisdiction of the courts, for trial by jury can not be taken away by implication, merely, in any case.'" (Italics supplied.)

Actually, there is no basis under the policies, and the law, and not a word of evidence in the record, to support the statements that the appraisers were, and were intended by the parties to be, empowered to interpret and construe the policies and to decide "the amount due the defendant under the policies," and to decide questions of law, with finality.

No provision in the appraisal clause in the policies says—certainly not in any "plain language" or "clear and unmistakable terms"—that the appraisers shall be authorized to interpret the policies or to find the amount due under them or to determine any other questions of law. The district court here did not find or state to the contrary, but, instead, he held that the power to interpret the policies and to determine the amount due thereon and to decide such and other questions of law was "implicit in or incidental to" the submission. He thus implied those powers. This was error, and contrary to the law as declared in the cases above cited.

As to the statement of the court that the appraisers were authorized to interpret the policies, there is a further short and complete answer. The statement is contrary to the actual provisions of the policies themselves. The printed portion of the policies contained the following paragraph:

"NON-WAIVER BY APPRAISAL OR EXAMINATION. This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof, by assenting to the amount of the loss or damage or by any requirement, act, or proceeding on its part *relating to the appraisal or to any examination herein provided for*" (R. 27). (Italics supplied.)

The obvious purpose of this paragraph in the policies was expressly to reserve from any submission to appraisers any power to construe or interpret the policies. The Supreme Court of California, in the case of *Stockton Combined Harvester & Agricultural Works v. Glens Falls Ins. Co.*, 98 Cal. 557, 33 P. 633, 634, where this very para-

graph was before it, observed that such was its purpose and effect. This provision is mutual and inures to the protection of the insured, the same as to the insurers, because, as stated by Judge Lurton in *Continental Ins. Co. v. Garrett*, 125 F. 589, 591, "An award ought not to be valid or invalid at the option of one only of the parties."

As to the intention of the parties,—and Judge Cardozo in the *Marchant* case, *supra*, said that "the question is one of intention,"—we point out that the insurance companies, by the Withers and Ball memorandum to the appraisers, expressly told the appraisers that:

"The conduct of an appraisal under the policies held by Pickering Lumber Corporation *is not a legal procedure nor arbitration*. It is a special proceeding under the policies in which *the appraisers are authorized only to determine the amount of loss sustained and the value of the subject of insurance without reference to the question of liability or extent of liability for such items of loss.* * * * *They are not authorized to interpret contract or to deal with the legalities of the contract. Should there be questions involved as to coverage, extent of liability, or the applications of the terms of the contract, the award should be in such form and detail that either interpretation of the coverage or liability could be applied*" (Page 1 of Deft's Ex. 3). (Italics supplied.)

Furthermore, the appraisers themselves so understood, for they were at pains to say, in the last paragraph of their report, that:

"In reaching such findings the appraisers or umpire did not find it necessary to resolve any legal question of coverage or extent of liability" (R. 170).

Thus it is made clear that the only agreement between the parties respecting appraisal was that contained in the policies themselves, and that the appraisal clause of the policies did not—certainly not by any "plain language" or by any "clear and unmistakable terms"—

authorize the appraisers to interpret the policies or to decide such and other questions of law, but, to the contrary, the policies contained a clause expressly reserving those powers from the appraisers, and that appellees, in writing, definitely told the appraisers that they did not intend that the appraisers should interpret the policies or decide questions of law, and that the appraisers so understood, and the District Court, believing that such questions were "implicit in or incidental to" the submission, implied the power in the appraisers to interpret the contract, decide questions of law, determine the amount due under the policies and resolve the whole controversy, which was clear and vital error.

Further, it is obvious that the California legislature, in enacting the fire insurance policy form statute which contains this appraisal clause, did not intend nor contemplate that the "appraisers," for which it provided, should be "arbitrators" with power to construe and interpret the policies, and to decide such and other questions of law with finality. To demonstrate this, we again point out that the appraisal clause is contained in the printed part of the policies, which is precisely in the form designed by the California fire insurance policy form statute (Secs. 2070, 2071, California Ins. Code, 1937) for inclusion in policies of direct fire insurance. We next point out that at least since the decision by the Supreme Court of California in the case of *California Annual Conference of M. E. Church v. Seitz*, 74 Cal. 287, 15 P. 839, in the year 1887, it has been the settled law in California that a contract by which the value of property or the amount of loss or damage is, for the purpose of the contract, to be fixed by third persons, is a mere appraisalment and not a submission to arbitration⁴². And

⁴²In that case, at p. 841 of 15 P., the court said:

"Accordingly in the well-considered case of *Scott v. Avery*, 5 H. L. Cas. 811, it was held that a condition in a policy of insurance in a mutual company, that the loss should be 'ascertained and settled by the committee,' was not a submission to arbitration in its proper sense, but was a condition precedent to the right of action. Similar decisions have been made in this and other states. *Holmes v. Richet*, 56 Cal. 307; *Loup v. R. R. Co.*, 63 Cal. 103; *Cox v. McLaughlin*, Id. 207; *Old Saucelito Co.*

the Supreme Court of California, in the case of *Bewick v. Mecham*, 26 Cal. (2d) 92, 156 P. (2d) 757, decided in 1945, said, on this point, that the Seitz case, *supra*, "may be considered as establishing this doctrine in this state" and, in quoting from *Brink v. New Amsterdam Fire Ins. Co.*, 28 N. Y. Super. Ct. 104, said, further, "'There is scarcely a day in which, in commercial transactions, the valuation of property or estimate of damages is not entrusted to third parties, and no one has yet dreamed of looking upon them as arbitrators * * *.'" Such is the long-standing and settled law of California.

Since 1851, and therefore long prior to the decision by the California Supreme Court in the Seitz case, California has had an arbitration statute (now Secs. 1280, et seq., of The Code of Civil Procedure of California), and for a long time prior to March 18, 1909, it also had a statute (now Sec. 16, The Code of Civil Procedure of California—also Sec. 13, The Civil Code of the State of California) saying:

"* * * technical words and phrases and such others as have acquired a peculiar and appropriate meaning in law, or are defined in the succeeding section, are to be construed according to such peculiar and appropriate meaning or definition."

In the light of this background, the California Legislature, on March 18, 1908, enacted the California standard

v. Commercial Co., 66 Cal. 253, 5 Pac. Rep. 232; *Adams v. Ins. Co.*, 70 Cal. 198, 11 Pac. Rep. 627; *Carroll v. Ins. Co.*, 13 Pac. Rep. 863; *Canal Co. v. Coal Co.*, 50 N. Y. 250; *Hudson v. McCartney*, 33 Wis. 344; *Haley v. Bellamy*, 137 Mass. 359; *Flint v. Pearce*, 11 R. I. 577; *Gauche v. Ins. Co.*, 10 Fed. Rep. 355; *Fox v. R. R. Co.*, 3 Wall, Jr. 245. *These cases hold that a contract by which the value of property or the amount of damage is, for the purpose of the contract, to be fixed by third persons, is not a submission to arbitration, and therefore to enforce it does not trench upon the jurisdiction of the courts. Now, if this is so, if such a proceeding is not analogous to the investigation by a court of a controversy between the parties, why need it be conducted according to the rules which govern courts in their investigations? We think that it need not; that the proceeding is a mere appraisal or valuation, which, although binding upon the parties, is not the submission of a controversy to arbitration, and is therefore not subject to the rules which govern arbitrations. And to this effect are the best-considered cases.*" (Italics supplied.)

fire insurance policy form statute (now Secs. 2070, 2071, California Insurance Code, 1937) requiring direct fire insurance policies insuring California property to be in the form of the printed portion of the policies here, and thus to contain the appraisal clause here involved.

It must be presumed that the California legislators knew, when they enacted this policy form statute, that the Supreme Court of California had uniformly held that third parties appointed to determine the value of property, or the amount of loss or damage to property, were appraisers and not arbitrators, and it must be assumed, too, that they knew of their own statute saying that words of technical legal import should be understood in their technical legal sense.

Yet—and this is most significant—the California Legislature, in prescribing the appraisal clause in the policy form statute, did not once use the technical word “arbitration,” but, instead, used the technical words “appraisement” and “appraisers,” thus providing, as clearly as words could, for an “appraisement,” as that term has been settled by the Supreme Court of California in the Seitz case and other cases, and not for an “arbitration” of all controversies under the California arbitration statute.

This identical situation was dealt with by the Supreme Court of Missouri in the case of *Dworkin v. Caledonian Ins. Co.*, 285 Mo. 342, 226 S. W. 846, where it was held that it must be presumed that the Legislature, in passing the policy form statute, understood the distinction in meaning between the technical words “appraisers” and “arbitrators,” and provided for an “appraisement,” not an “arbitration,” with that distinction in mind.⁴³

⁴³In that case the court said, p. 850 of 226 S. W.:

“But the principal rule of interpretation to be applied to the act in question (the arbitration statute) is prescribed by our statutes, to-wit:

“Technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their legal import.”

“That is to say, in getting at the intention of the legislators in enacting a law which contains a technical expression, we must presume the expression was used in its technical sense,

This makes clear that the California Legislature, in enacting its policy form statute, which contains the appraisal clause here in question, did not contemplate nor intend that the appraisers they provided for should have the power of arbitrators, and makes clear, too, that the parties here, in the use of that appraisal clause, did not so intend.

In addition to the procedural differences between appraisal and arbitration (such as the legal requirements that arbitrators—but not appraisers—must hold formal hearings on notice, swear the witnesses and take testimony, and decide the matter solely on that testimony), whether it be statutory or common law arbitration, there is the fundamental distinction that arbitrators, in the technical sense of the term, are private judges and proceedings before them are a substitute for proceedings in court, and they have power to conclude, even mistakenly, both the law and the facts by their award,⁴⁴ whereas, apprais-

unless there is something in the context to indicate that it was not. * * * If the word 'arbitration' was used in the statute in its legal sense, and as a term of art, then beyond a doubt the stipulation for an 'appraisal' was not one for an arbitration. * * *

"As the difference between an agreement for an arbitration and an agreement for an appraisal had been recognized by the courts of this state many years prior to the enactment of the section in question, we must presume the distinction was known to the members of the Legislature and that they passed the law with it in mind."

⁴⁴In *Burchell v. Marsh*, 58 U. S. 344, 17 How. 344, 349, it is said:

"Arbitrators are judges chosen by the parties to decide the matter submitted to them." (Italics supplied.)

In *Empire Plexiglass Corp. v. Levitt Corp.*, 192 N. Y. Misc. 251, 77 N. Y. Supp. (2d) 85, it is said:

"Arbitrators are judges in fact, though not in name." (Italics supplied.)

In *California Annual Conf. M. E. Church v. Seitz*, 74 Cal. 287, 15 P. 839, 840, it is said:

"An arbitration is a substitute for proceedings in court."

And at 842:

"An award is the judgment of a tribunal selected by the parties to determine matters mutually at variance between them—not merely to appraise and settle the price of property * * *." (Italics supplied.)

In *Thompson v. Newman*, 36 Cal. App. 248, 171 P. 982, 983, it is said:

"An arbitration presupposes a controversy * * * to be tried and decided, and the arbitrators proceed in a judicial way, * * *."

ers, in the technical sense of the term, have no judicial powers, but are mere valuers.⁴⁵

But the District Court in this case relied upon, and cited in support of his conclusion, that these appraisers had power to interpret the policies and decide questions of law, with finality, the cases of *Continental Ins. Co. v. Titcomb*, 7 F. (2d) 833 (8th Cir.); *Chandos v. American Fire Ins. Co.*, 84 Wis. 184, 54 N. W. 390; and *Patriotic Order Sons of America v. Hartford Fire Ins. Co.*, 305 Pa. 107, 157 A. 259.

In the *Titcomb* case the court was dealing with a case that arose in, and under the fire insurance policy form statute of, Minnesota, and, of course, even at that time and before *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, the federal courts were bound by the state courts' construction of the statutory laws of the state. As pointed out in the opinion in the *Titcomb* case, "Minnesota had uniformly held that these proceedings to ascertain the amount of damages under standard policies constitute a common law arbitration." (Citing *McQuaid Market House Co. v. Home Ins. Co.*, 147 Minn. 254, 180 N. W. 97; and *American Central Ins. Co. v. District Court*, 125 Minn. 374, 147 N. W. 242.) Such a proceeding being made "a common law arbitration" in Minnesota, the federal court was required to hold that "the award,

Their investigation is *in the nature of a judicial inquiry*." (Italics supplied.)

In *St. Paul Fire & M. Ins. Co. v. Eldracher*, 33 F. (2d) 675, 678, (8th Cir.), it is said:

"Arbitrators are said to act *both as court and jury, determining the right of a controversy as well as the quantum of relief*." (Italics supplied.)

⁴⁵In *Zallee v. LaCled Mutual Fire & M. Ins. Co.*, 44 Mo. 530, 532, it is said an appraisal is "something less than an arbitration."

In *Littlehead v. Sheppard*, 123 Okla. 29, 251 P. 60, 62, it is said: "Appraisement means 'a valuation of, or an estimation of, the value of property.'"

In *Tax Commission of Ohio v. Clark*, 20 Ohio App. 166, 151 N. E. 780, 781, it is said: "To 'appraise' means to value property at what it is worth."

In *American Fire Ins. Co. v. Bell*, 33 Tex. Civ. App. 11, 75 S. W. 319, 320, it is said: "They (appraisers) have no judicial powers * * *."

In *Phoenix Ins. Co. v. Everfresh Food Co.*, 294 F. 51, 55 (8th Cir.), it is said appraisers are "not called on to discharge *judicial or quasi-judicial functions* as in arbitration, but to render a duty *ministerial in character*." (Italics supplied.)

being governed by the rules applicable to a common law arbitration, * * * is not open to attack, *except upon the ground that the arbitrators went entirely outside the scope of the submission.*” (Italics supplied.) It is pointed out in *Hanley v. Aetna Ins. Co.*, 215 Mass. 425, 102 N. E. 641, 642, that there are various decisions in Minnesota, and one in South Dakota and one in Wisconsin, holding “that referees appointed under a standard form of policy * * * should set as a quasi court and *decide the case* on the evidence offered by the parties,” and the court then pointed out that “the opposite conclusion, however, has been reached in every other state in which the question has arisen.” (Citing a long list of authorities.) Thus it appears clear that the District Court here, by relying upon and following the *Titcomb* case, applied the old Minnesota rule (from which even Minnesota has receded in the case of *Ciresi v. Globe*, 187 Minn. 145, 244 N. W. 688) that fire insurance appraisers, under their policy form statute are “common law arbitrators,” when such is not and never has been the law of California.

In the *Chandos* case, *supra*, cited and relied upon by the District Court, it was simply held, so far as our question is concerned, that (p. 392) “In general, *arbitrators* have full power to decide upon questions of law and fact, which directly or incidentally arise in considering and deciding the questions embraced in the submission. When not limited by the terms of the submission, they have authority to decide questions of law necessary to the decision of the matter submitted, *because they are judges of the parties’ own choosing.*” That is the power of arbitrators, but we are here dealing with “appraisers” to “estimate and appraise the amount of loss,”—not with “arbitrators” to judge the controversy—and, by the submission, questions of policy interpretation and of law were not intended to be, and were not, submitted to the appraisers, but such questions were expressly withheld from them.

In the case of *Patriotic Order Sons of America v. Hartford Ins. Co.*, *supra*, cited by the District Court,

the court held that findings of the amount of loss made by appraisers, *within* the submission, are binding. Of course, that would be true, but, as there pointed out by the court, if the appraisers did not value "all the items of loss" or "cover everything contemplated by the agreement," the award would not be binding, and the court said at p. 262, "The general rule undoubtedly is that, unless restricted by the agreement of submission, *arbitrators are the final judges of both law and fact, and an award will not be reviewed or set aside for mistakes in either.*" Such is the power of arbitrators, but the valuers here were appraisers, and the parties here did not intend to, and did not, submit to the appraisers questions of policy interpretation and of law, for determination, but intended to, and did, expressly withhold such questions from them.

We submit that the foregoing demonstrates that it was not the intention of the parties to empower, and they did not empower, the appraisers to interpret the policies and decide such and other questions of law, but, on the contrary, intended to, and did, expressly withhold such powers from the appraisers, and that, though there is no language—certainly no "plain language" or "clear and unmistakable terms"—in the appraisal clause authorizing the appraisers to interpret the policies and decide questions of law, or to do more than simply "appraise the loss," the District Court *implied* power in the appraisers to interpret the policies and to decide questions of law, with finality, and following the old Minnesota rule, as stated and necessarily followed by the Eighth Circuit in the *Titcomb* case, that appraisers under fire insurance policy are "common law arbitrators," held that the appraisers here were authorized by the parties to interpret the policies and decide questions of law, with finality. This was clear and vital error.

Having thus decided that the appraisers had power to construe the policies, determine questions of law and conclude the whole controversy with finality, the court had determined the case, and, we believe, it is only natural that this conclusion of the result greatly influenced

the consideration the court gave to the merits of appellant's three challenges upon the validity of the appraisers' report, and this we hope to demonstrate in the argument of those points.

II.

The court erred in holding that the fact that the appraisers "considered" the excess logging costs, the decking expense and the log depreciation, aggregating \$91,439.34, and made a lump sum compromise allowance thereon of \$25,000.00, constituted a proper discharge of their duties under the submission.

The amounts of these items set up in appellant's proof of loss were:

Excess logging costs after the fire	\$42,797.04
Log decking expense	12,492.35
Log depreciation	36,149.95
Total.....	<u>\$91,439.34</u>

The appraisers were to "appraise the loss." The word "appraise" means "To value property at what it is worth" (*Bouvier's Law Dictionary*, Third Revision). This means that the appraisers were to exercise their reasoned judgment in determining the full and true value of these items in money.

Instead of doing this, the appraisers undertook to act as judges and to construe the policies and their coverages, and, being doubtful whether the policies covered and insured these items, undertook to adjudicate them according to their own ideas of rough justice, and made, without any computations, an arbitrary lump sum compromise allowance of these items in the round sum of \$25,000.00.

There was no dispute before the appraisers about the figures. The same figures were presented to the appraisers by appellees as were contained in appellant's proof of

loss, and it was agreed by all parties that these figures were the only figures necessary for the appraisers to consider.⁴⁶

The appraisers in fact accepted the excess logging cost figure of \$42,979.04 and the log decking figure of \$12,492.35 and the log depreciation figure of \$36,149.95,⁴⁷ but "there was a dispute between the appraisers as to whether these things should be allowed at all or not." The appraisers entertained the notion that inasmuch as appellant still had the logs on hand it would, by milling them, recover its cost for them "in the long run," and therefore "should absorb this cost."⁴⁸ Mr. Herrick held the view that the loss of worth in logs was "deterioration" and not "depreciation" within the meaning of that term as used in, and insured by, the policies,⁴⁹ and there was much discussion between the appraisers upon "the question as to the allowability of it (these claims) at all," and finally the appraisers, without making any kind of computation and without finding the amount of any of these items and without submitting their matters of disagreement to the umpire, agreed upon an arbitrary, lump sum, compromise allowance of \$25,000.00 for these three items aggregating \$91,439.34. On this point Mr. Herrick testified (R. 537):

"Q. Was it arrived at by agreement?
A. Yes.

⁴⁶See footnotes 11 and 12 on pages 17 and 18.

⁴⁷See footnotes 13, 14 and 15 on pages 18 and 19.

⁴⁸Mr. Herrick testified (R. 538, 539): "Q. Was it your idea that a part of the cost after the fire went into the logging, and they still had logs on the way, and for that reason they should absorb this cost? Was that the idea? A. Why, that is fundamental, Judge. Q. Well, am I right? A. Certainly you are right on that."

Mr. Maloney testified (R. 604): "Q. Do you remember what was done with that; whether it was allowed or not? A. No, not—as a single individual item, it was not. Q. Do you remember why it was not? A. There was a great deal of discussion in regard to excessive logging costs; and the values to them; and that there should be some recovery, but they would be benefited by it in the long run."

⁴⁹Mr. Herrick testified (R. 540): "The so-called log stain was designated in the claim as depreciation; and if you will pardon me for saying so, Judge, that was not true. It was not a depreciation as the term is understood. It was deterioration, which was not a continuing expense."

Q. Was there a dispute between the appraisers as to whether these things should be allowed at all or not?

A. Yes.

Q. Is that what resulted in the agreement?

A. Yes.

Q. Was it a compromise?

A. You might call it—, yes, I think you would call it a compromise.”

Mr. Maloney, referring to a sheet containing these items, with a bracket around them, and \$25,000.00 written at the side in Mr. Herrick's handwriting, testified (R. 605):

“That means that we allowed \$25,000.00 for the first four items on the sheet.”

This is the uncontradicted testimony of the appraisers as to how they “considered” and treated with these items.

When one agrees that the value of his property or the amount of his loss shall be “appraised” by appraisers, he contemplates, and is entitled to expect, the reasoned judgment of the appraisers in finding the full and true value of his property in money. He authorizes nothing less. He does not authorize the appraisers to construe the contract, nor to adjudge his legal rights thereunder in accordance with their own ideas of the equities, nor does he authorize appraisers to make an arbitrary, round figure, lump sum, compromise of his rights, for certainly that is not an appraisement. Yet that is exactly what happened here.

The appraisers were not only unauthorized to construe the policies and to adjudge whether or not they covered these items, but, being laymen, lacked the special competence to do so, as shown by the legal notions they entertained.

In respect of the log depreciation, they entertained the notion that the company still had the logs on hand and, by milling them, would get its cost back “in the long run,” and should therefore absorb the depreciation. This was

obvious error. When one suffers a loss on property insured against such loss, the question, with respect to the insurer's liability, is not whether he may nevertheless recover his cost in his operations. The question is, rather, did he have a loss that was insured, and, if so, the amount of it. Appellant had a value in these logs that was lost forever by depreciation. That loss was expressly insured by these policies. The word "depreciation" was specially put into the insuring provisions of the policies at the request of appellant. This is shown at R. 408, 409, as follows:

"Q. * * * I ask you with respect to the use of that word 'depreciation' as included in ITEM II of the insuring clause: Was that word in the policies as originally furnished to Pickering?

A. The first policy—

Mr. Levit: Just a moment, I didn't understand that question at all.

The Court: He is trying to bring out the point that as originally furnished, the policies didn't include the word 'depreciation.'

Mr. Levit: You mean that the form was changed after the policies were originally issued?

Mr. Whittaker: The policies were sent back and the insurance companies told that we wanted a specific coverage of depreciation, and the policies were accordingly altered and that word 'depreciation' was put in insuring ITEM II, where it appears in the typewritten portion of the policies now mimeographed in the exhibit before the Court.

Mr. Levit: If counsel says that is the fact, I will stipulate to it.

The Court: Well, that is stipulated to, then."

The loss of worth in these logs occurred through "depreciation." "Depreciation" was insured. This is true beyond debate.

Mr. Herriek's notion that the loss of worth in the logs was "deterioration" and not "depreciation" within the meaning of insuring "ITEM II" of the policies was likewise both beyond the submission and legally unsound. *Webster's Twentieth Century Dictionary* defines the word "deterioration" as "To make worse; to reduce the value

of; to reduce in worth," and the word "depreciation" is given as a synonym, which, of course, it is.

Not only were the appraisers unauthorized to adjudge the coverage of the policies, but moreover the notions they entertained in that respect were clearly wrong.

The district court said in his opinion (R. 116):

"Apparently in determining these three items the referees also considered that labor and material costs generally had risen, that labor was more inefficient, and that these factors made the logging cost greater than in similar periods in the past, and would have occurred had there been no fire."

This overlooks the fact that any such issue had been removed from the case, because, as had been pointed out to the appraisers by the insurance companies, on page 3, 4th paragraph, of the Withers and Ball "Memorandum to Appraisers" (Deft's Ex. 3):

"* * * It was agreed with the assured that the experience of the fiscal year 1944-1945 should be used as a basis of the adjustment of the loss. *The purpose of such agreement, which benefited assured, was to avoid discussions and arguments as to increasing costs, decreasing labor efficiency, and increasing sales values during the period following the fire.*" (Italics supplied.)

The district court pointed out in his opinion (R. 115) that Mr. Herrick wrote in a letter (Plf's Ex. V) that "a reasonable claim (for excess logging cost) probably would not have been more than \$15,000 to \$20,000." The appraisers were not commissioned to say what the item "probably" amounted to. Nor is there any statement as to what the decking expense of \$12,492.35 and the log depreciation of \$36,149.95 "probably" amounted to; but, if it be assumed that the excess logging costs did not amount to "more than \$15,000 to \$20,000," would appellant also be bound by the assumption that the total of the decking expense and the log depreciation, aggregating \$48,642.30, did not amount to more than the

\$5,000 to \$10,000 difference between the “probable” amount of the excess logging costs and the compromise allowance of \$25,000.00?

The district court said in his opinion (R. 117, 118):

“It is contended here that the appraisers did not *consider* or determine these three items, but the evidence is to the contrary. The testimony of Herrick, Maloney and Lilly show that they *considered* each of these items and that the allowance of \$25,000.00 included the excess log cost, the log stain and the log decking.” And said further (R. 118): “Accordingly it can not be said that the appraisers failed to *consider* or determine these three items.” (Italics supplied.)

There can be no doubt the appraisers “considered” them. But they “considered” them of doubtful allowability, and being unable to agree upon “the allowability of them at all,” abandoned their duties to “appraise,” and find the true value of the items, but, instead, decided to adjudge them in accordance with their own ideas of rough legal justice, and they put them all in one package and made an arbitrary, lump sum, compromise of them in the round figure of \$25,000.00. The court was clearly in error in holding that this constituted a proper discharge by the appraisers of their duties under the submission.

The invalidity of such an award has been clearly decided by the courts.

A case almost exactly in point is *St. Paul Fire & Marine Ins. Co. v. Eldracher*, 33 F. (2d) 675 (8th Cir.). There the court considered the validity of an appraisal made under the appraisal provisions of a fire policy identical with the appraisal provision here. An appraisers’ award had been made, but despite it an action followed on the policy asking a larger sum. The insurers pleaded the award in bar. The insured replied, setting up (P. 677) “that the award did not express the judgment of the appraisers, but was made solely for the purpose and in the belief that it would be acceptable to both parties as a basis for settlement.” This equitable issue

was heard and determined by the trial court without a jury. He held (P. 677-8) "that the appraisers were not able to agree on either item" (sound value or damage) "in their report and arbitrarily fixed those sums as a basis on which the loss could be settled, in the belief that both parties would be satisfied." On appeal, the 8th Circuit commented upon the fact that appraisers must act within "the scope of the submission," as follows (p. 678):

"An arbitrator or appraiser has no power to act outside the scope of the submission. In the present case the only power delegated to Amber and McCormack as appraisers was to to state separately the sound value of the property and the damage thereto caused by the fire. They could do nothing else. They could decide upon nothing except the matters submitted to them. If they went beyond the submission, their award to that extent would be void, and if they wholly failed to pass upon the matters included within the submission their award, whatever it might be, would be wholly void."

The court then looked into what the appraisers had actually done to ascertain whether they had "acted beyond and outside the scope of the submission in making up their award," and on that point said (p. 679):

"McCormack testified that after he and Amber examined the premises that each made their figures and were very far apart, so far apart there was no way of getting them together without a great deal of work, so they agreed to leave it to the umpire, and before the umpire was brought in and asked to serve he had a conversation with the Eldrachers and with other parties who he thought represented the insurance companies, or some of them, and received the impression that both sides would be willing to settle for \$55,000.00; that thereafter he was not concerned about how the amount to be paid the Eldrachers should be arrived at, as long as they might get approximately \$55,000.00; *that he and Amber never agreed on sound value or damage.*" (Italics supplied.)

Thereupon the appraisers got together and computed that the Eldrachers would receive approximately \$55,000.00 by making up an award which stated sound value to be \$100,000.00 and the damage to be \$74,127.43, and they made their award accordingly. Of this action the court said (p. 679):

“Clearly, this was an abandonment of any further effort to comply with the authority under the submission, and the award which they signed was in the exercise of power not conferred upon them.”

There, as here, the appraisers “never agreed on sound value or damage.” They did not, in our case, appraise the value of these items, but, as in the Eldracher case, being unable to agree on value, “abandoned any further effort to comply with the authority under the submission.”

In *Holker v. Parker*, 11 U. S. 436, 7 Cranch 436, Mr. Chief Justice Marshall, speaking for the court, stated that the question to be decided, in determining whether an award of arbitrators was binding on the parties, was “whether this be, in fact, an award, in forming which the judgment of the arbitrators has been exercised, or a compromise wearing the dress of an award.” As to the testimony of the arbitrator, the court said:

“To the deposition of Mr. Lowell himself, great respect is due. He denies a compromise; but on examining his testimony, the court is of opinion, that his denial goes no further than to the form of an agreement. The facts he states prove one in substance * * *. He thought it his duty, he says, to secure even this sum for his client, rather than have an award that Parker owed him nothing; * * * This, then, is substantially a compromise, and not an award.”

In our case, the compromise is not denied, but is positively shown and expressly admitted.

In the case of *Lee v. Providence Washington Ins. Co.*, 82 Mont. 264, 266 P. 640, appraisers appointed under a

fire policy to appraise the sound value of, and damage caused by fire to, a building, allowed physical depreciation of the building of 1.87% per annum during its life and then, in additon, allowed "commercial depreciation" of 10%. This action followed on the policies, and the appraisers' award was pleaded in bar. One of the appraisers, when asked to explain the "commercial depreciation," testified, "It is just simply a depreciation that we placed on the building to be less than 10 per cent. than what it would be in a growing—in a town where things were going along." The other appraiser testified that "you could not compute it at all." The Supreme Court of Montana held the award invalid, saying, p. 644:

"But that the deduction of 10 per cent for 'commercial depreciation' was made without basis in fact or in law is clear." And said further (p. 645): "Appraisers can not arbitrarily fix a valuation upon property without regard to the character of the property. *Carlston v. St. Paul Fire & Marine Ins. Co.*, *supra*. It follows that as a matter of law their action amounted to misconduct, misfeasance."

The fundamental error there, as here, is that the appraisers went outside the submission and attempted to resolve legal questions, of policy coverage and extent of liability, that were not submitted to them, and thus abandoned their duties, as appraisers, and made a gross mistake, and the parties are not bound by it.

In *Ciresi v. Globe & Rutgers Fire Ins. Co.*, 187 Minn. 145, 244 N. W. 688, appraisers were appointed, under the provisions of the policy, to appraise the loss or damage to an automobile that had been stolen for over a month and driven 8,600 miles. Necessary repairs were made at a cost of \$201.00. The appraisers fixed that sum as the amount of loss or damage to the automobile. There had been substantial general depreciation of the car not made good by the repairs. "The appraisers construed the policy to limit plaintiff's recovery to the cost of repairs or replacement and to exclude anything additional for de-

preciation not made good by the repairs" (p. 689). Of this action the Supreme Court of Minnesota said (p. 690):

"It was not for the appraisers to determine one way or the other the ultimate question of liability. Although they might consider it as a preliminary matter, their finding on a question of coverage, which would be a decision on a question of law, would not be final * * *. Their only function was to decide the simple fact issue as to 'the amount of loss or damage.' That was the only question submitted to them. It is plain that their award was not responsive to that issue. Knowingly, albeit in good faith, they omitted a major item of at least \$600.00. Actual fraud was neither intended nor perpetrated. Yet there was a gross mistake which, unless rectified, will wrongfully deprive plaintiff of recovery for the substantial item in question."

Again there, as here, the underlying error was that the appraisers did not discharge the submission, did not appraise the loss, but abandoned their functions, as appraisers, and undertook to construe the policy, and to adjudge the rights of the parties, according to their own ideas of the law and the equities.

In the case of *Tabor v. Craft*, 217 Ala. 276, 116 So. 132, there was a dispute between abutting land owners over the dividing property line, which was constituted in part by a river. The parties submitted to arbitrators the matter of determining "the true location of Flint river." The arbitrators' report purported to fix the dividing property line, but did "not locate Flint river as the boundary between the parties to the agreement." "Their theory of the case was that, finding it impossible to trace the course of the river according to the field notes, they undertook to make an equitable division of the disputed area." Of this the court said:

"The report setting out the result of the arbitration, disclosing the fact that the arbitrators did not proceed in pursuance of the agreement of arbitration, *but according to their own idea of an equitable division between the parties*, the result is not

binding upon appellant, and for the reason that the right of the parties and the duty and authority of the arbitrators must be measured by the terms of the submission.”

The appraisers were authorized only to appraise the value of these items. The parties authorized nothing else. The appraisers did not appraise the value of any one of these items. The court does not find the contrary. Rather he finds they “considered” them and that, to some unknown extent, they entered into the \$25,000.00 compromise allowance. “Consideration” of the items was not all the submission required. It required that the value of the items be appraised. Instead of appraising the value of these items, the appraisers undertook to construe the policies and to adjudge their coverage of these claims, and, entertaining erroneous legal notions making it doubtful, in their minds, that the policies covered these items, they undertook to adjudge them according to their own ideas of the law and rough justice, and put them all in one package and made an arbitrary, lump sum, compromise, allowance of them in the amount of \$25,000.00, and thus both exceeded the submission and failed to discharge it, and appellant is not bound by what they did.

III.

The court erred in holding that the appraisers did not exceed, but properly discharged, the submission in rejecting appellant’s actual cost, and in substituting OPA ceiling prices, for the lumber put through the box shook mill after the fire.

In the nine months loss period following the fire appellant milled 8,828,644 feet of its lumber, that had been graded as box lumber, into 8,636,974 feet of box shook, which it promptly sold.

Appellant’s actual cost for the box lumber to the point of diversion to the box factory—without a penny’s profit being

allocated to operations prior
to that diversion point—was \$39.86 per M

Its cost of milling the lumber
into shook was 11.65 per M

Its under-run of 191,670
feet was 1.03 per M

Its shipping costs were .97 per M

Its total actual cost for
the shook was \$53.51 per M

Its total actual realization
for the shook was \$60.22 per M

Its total profit was \$ 6.71
\$60.22

\$6.71 x 8,828,644 feet—all credited to appellees—
\$59,240.93.

Appellant had not produced this box lumber for sale, as lumber, and never offered it for sale, and it was not for sale, as lumber, but had produced and held it for the supply of its box shook mill for cutting into, and sale as, box shook.⁵⁰

Because of war needs for shipping crates, or boxes, our government undertook to encourage the production and sale of box shook, and to discourage the sale of box lumber, as lumber, by setting OPA ceiling prices at a high figure for box shook and at a very low figure for box lumber, and as a result box lumber could not be purchased at OPA ceiling prices,⁵¹ and, inasmuch as more than OPA ceiling prices could not lawfully be paid for box lumber, there was no “market” for box lumber where it could be both *bought* and sold, and no “market value” for box lumber, which means “a price established by public sales, or sales in the way of ordinary business, as merchandise * * * the price at which such articles are sold and purchased.” (*Continental Rubber Works v. Bernson*, 91 Cal.

⁵⁰See footnote 4 on page 11.

⁵¹See footnotes 5 and 6 on pages 11 and 12.

App. 636, 638, 267 P. 553, 554; *Valentin v. Valentin* (Cal. App.), 209 P. (2d) 654, 656.)

It may be well to point out that box shook is simple lumber which, instead of being sent, from the diversion point, to the planing mills for finishing into lumber for sale as lumber, is sent to the box mill where it is simply cut into smaller boards (R. 318 and 409). Though it is simply lumber, there were different and higher OPA ceiling prices applying to box shook than to lumber, for sale as lumber. The OPA ceiling prices were not alone a stated sum of money per thousand feet, but were a stated sum per thousand feet plus freight from a basing point—in this case the basing point was Susanville, California (R. 418).

Appellant had always milled its box lumber into, and sold it as, shook. That was the purpose of its shook mill. By doing so it was able to obtain a much better realization for its box lumber than by selling it as lumber. Nothing in these policies required appellant to sell its box lumber, as lumber, and to suffer the losses that would be entailed in doing so.

Yet the appraisers here ignored appellant's actual cost for the lumber of \$39.86 per M, and ignored the fact that the box lumber was not for sale, as lumber, but was being held for finishing into shook, and indulged a theoretical sale of appellant's lumber, as box lumber, under OPA ceiling prices applicable to box lumber. They assumed the theoretical sale of half the box lumber for Merced, California, delivery, and the other half for Fresno, California, delivery, and averaged the freight salvage, from the basing point of Susanville, to the assumed delivery points of Merced and Fresno, and added that averaged freight salvage to the basic OPA price. Mr. Herrick testified (R. 546):

"A. The constructed market price which was used was based on the sale—I think for half the quantity at Modesto for Merced delivery, at which point it would have given the company the greatest return; and the other half at Fresno, which gave it a little less return, and it was averaged out."

Thus, in these theoretical sales, the appraisers used exactly the OPA ceiling prices, and came out with a figure of \$31.55 per thousand feet, which was \$8.31 per thousand feet less than appellant's actual cost for the lumber, and thus they increased the amount of recovery, by partial operations of the box mill after the fire, from the actual amount of \$6.71 to \$15.02 per thousand feet, or by this \$8.31 per thousand feet, or ($\$8.31 \times 8,828,644$ feet) \$73,365.93, and hence improperly, and wholly fictionally, increased the figure for recovered fixed charges and expenses, by box mill operations, from the \$59,240.93 credited by appellant, to \$132,606.86, to appellant's injury, as a matter of law, in the amount of \$73,365.93.

The appraisers "completely recognized that the OPA price on the quality and the grade of lumber that went through the box factory was less than the average cost of all lumber produced," and "it was within their general knowledge" that the box lumber could not have been purchased or replaced by appellant at OPA ceiling prices. They did not use OPA ceiling prices "on the theory that Pickering could have actually paid that." They used OPA ceiling prices upon the theory that appellant could not lawfully have sold that box lumber, as lumber, for a higher price, and because "it was the price that the law prescribed." To be specific on this point, we quote the testimony. Mr. Maloney testified (R. 613):

"Q. Then why did you use the OPA? A. Standard price. The known price. *It was the price that the law prescribed*, and Mr. Herrick and Mr. Lilly stated that was the proper accounting practice."

At R. 614:

"Q. It was what had been established by the government? A. Right. That is what we worked our price from.

Q. *Was that the only consideration?* A. *That's right, as far as the price base was concerned.*

Q. *There wasn't any other?* A. *Not to my knowledge.*" (Italics supplied.)

Mr. Lilly, the umpire, testified (R. 583):

“A. I think there were two views there, as I recall; Mr. Herrick had one view, and asserted one view to the effect that he thought the material being there should carry a higher price than OPA price; and Mr. Maloney said—I think took the opposite viewpoint, that the OPA price was the price to be used.

Q. Do you recall, in regard to that, making the decision? A. I think I acquiesced in the OPA price plus the agreed upon freight differential. I think that freight differential was Fresno and Merced or Fresno and Modesto; I can’t tell which.”

Mr. Herrick testified (R. 545):

“A. The constructed market price *was the so-called legal price at which the lumber could have been sold*—that is, the lumber which was converted into—through the box factory—*could have been sold as lumber* plus the most advantageous freight differential.

Q. Which, by the way, was a part of the OPA price, wasn’t it?

A. No, the OPA prices were on a basic point of Susanville to the point of destination, less the actual freight from Standard to the point of destination.

Q. * * * If they had sold under OPA, they would have been permitted to sell it that way, wouldn’t they?

A. Yes.

Q. In other words, the OPA prices being based at Susanville, if you could sell at places where the freight was less than that, you actually could make that freight differential by selling under the OPA?

A. Yes.” (Italics supplied.)

This testimony is so definite and specific as to leave no doubt that the appraisers indulged a theoretical sale of appellant’s box lumber, as lumber, under OPA ceiling prices applicable to box lumber, and did so because “it was the price that the law prescribed,” and was the price that “had been established by the government,” and was “the so-called legal price at which the lumber could have been sold, as lumber,” and that this was “the

only consideration" and "there wasn't any other" consideration.

We believe this demonstrates that there is no evidentiary support for the statement, in the district court's opinion (R. 109), saying that the appraisers did not use OPA ceiling prices because they thought the law so required, but that "they decided as a matter of practical and realistic accounting that OPA ceiling prices was the fairest, most practical and realistic method of costing the lumber into the box factory for the purposes of determining the profit from the box factory operations."

Not only were the appraisers unauthorized, under the submission, to adjudge these questions of law, but that power was expressly withheld from them; but nevertheless they attempted to decide, and misdecided, an important question of law in holding that OPA ceiling prices governed, to appellant's injury in the amount of \$73,365.93. This matter has been made too clear for extended debate by the very regulations of the Office of Price Administration themselves, and by the numerous court decisions on the point.

The OPA regulations themselves say, about as plainly as words can, that OPA ceiling prices do not apply to "the adjustment of losses made in connection with settlements of claims under policies of insurance."

The court, in the case of *Sun Insurance Office v. Rupp*, 64 Fed. Supp. 533, 538 (D. C. Mo.), says that is what those regulations say and mean. It said "the regulations promulgated by the Office of Price Administration provide that such rules and regulations shall not apply to settlements under policies of insurance." The court, in that case, had before it a suit upon a collision policy of insurance covering a truck which had been destroyed by collision. The insured claimed his cost for the truck. The insurer claimed that its liability could not exceed OPA ceiling prices. The court, after pointing out that Section 18 (e) of the order of the Office of Price Administration provides that "the term 'sale' does not refer to the adjustment of losses made in connection with set-

tlement of claims under policies of insurance against fire, theft, collision, other loss of property or other coverage, even though the right of subrogation may be involved. The term 'seller,' 'selling,' 'purchase,' 'purchaser' and 'purchasing,' shall be construed accordingly," and, after holding, as we have quoted, that OPA prices do not apply to settlements under insurance policies said further:

"However, it seems to me that the court is definitely confronted with the proposition of how the actual cash value under conditions as they existed at the time of the loss under the Emergency Price Control Act might be arrived at.

The insured found himself in the anomalous position that settlements and adjustments for loss arising under policies of insurance were specifically excluded from the provisions of the Emergency Price Control Act of 1942, 50 U. S. C. A. Appendix, Secs. 901, *et seq.*, yet by that Act the normal market value of all equipment like that insured had been completely destroyed and all prices arbitrarily fixed by law, which it would seem rendered inapplicable the construction placed by the courts upon the phrase 'actual cash value.'

We are faced with the problem that there was no market price for such equipment other than the ceiling price established by the Office of Price Administration, and the very Act which created those ceiling prices specifically exempted adjustments under policies of insurance from the provisions of the Act. Had the owner of this property gone out into the open market and sold the equipment for an amount in excess of these ceiling prices, as heretofore stated, he would have been liable not only to the person to whom he sold it for severe penalties, but would also have subjected himself to criminal prosecution.

We must therefore find some other way of arriving at the actual cash value of the destroyed property. The owner testified that the equipment was essential to the conduct of his business and that he was not able to acquire equipment elsewhere at any price."

The court concluded by allowing the plaintiff to recover his cost for the destroyed truck.

In the case of *Tierney v. General Exchange Ins. Corp.*, 60 Fed. Sup. 331 (D. C. Tex.), the District Judge had before him an action upon a fire insurance policy covering an automobile. The insured claimed his cost for the same, of \$3,384.00. The insurer claimed its maximum liability was the OPA ceiling price, of \$1,600.00. The court, in deciding the issue, said (P. 332):

“We must bear in mind that the War Powers Act, 50 U. S. C. A. Appendix, Secs. 631, *et seq.*, was for the purpose of curbing, lessening and preventing inflation, so far as legislation could or can accomplish that end. In order to make regulations under it legally effective, it was necessary that they should be sufficiently specific to cover the transactions at which they were aimed. The particular schedules pertinent to this study concern the ‘sale, or delivery’ of used cars. There is no apparent reasonable stretch of the regulations which would cover an ‘adjustment for insurance’ losses. *In truth, there is a phrase in the regulations which excepts such efforts from the regulation.* Nor is there anything in the act or regulations which compels the owner of property to dispose of it. The owner who has paid for an automobile and who does not see fit to ‘sell’ that automobile, or to ‘deal’ in it, ought not to be classified as a ‘seller’ or ‘dealer’ if and when he seeks pay from an insurance company which has collected a premium from him and agreed to pay him for the fire loss of his property. Such an event does not classify him as either a ‘seller’ or a ‘dealer.’ He has not been identified in any of the regulations under the Act, and *seems to have been excepted from their operation.*” (Italics supplied.)

The above case was appealed to the Fifth Circuit, *General Exchange Ins. Corp. v. Tierney*, 152 F. (2d) 224. The court disposed of the appeal, saying:

“The War Powers Act, 50 U. S. C. A. Appendix, Secs. 631 *et seq.*, was for the purpose of curbing and preventing inflation. To accomplish such purpose it fixed a ceiling price on the class of cars here under consideration of \$2,000 for purchase or sale. It no-

where attempts to regulate or control adjustments for insurance loss. Moreover, it does not attempt to measure or fix value in setting up a price to be paid when such cars are bought and sold. Tierney was a traveling man, and his car was not for sale; and the regulations do not compel him to dispose of his automobile. He was not in the business of 'selling' or 'dealing' in automobiles, and the Act does not classify him as such. He has not been identified in any of the regulations under the Act, and we are of opinion that he has been exempted and excepted from its operation. The promulgation of the Price Administrator on July 10, 1944, was designated as Regulation MPR 540 and is as follows:

'(c) "Sale" includes sales, dispositions, exchanges, and other transfers and contracts and offers to do any of the foregoing. It includes conditional sales and sales under rental contracts, lease agreements or other agreements. It also includes transfers by banks, finance companies, or other persons discounting promissory notes following the taking of possession by such persons upon default of the person making such promissory notes. The term "sale" does not refer to the adjustment of losses made in connection with settlements of claims under policies of insurance against fire, theft, collision, other loss of property or other coverage, even though the right of subrogation may be involved. The terms "sale," "seller," "selling," "purchase," "purchaser," and "purchasing" shall be construed accordingly.'

The ceiling price fixed by the Office of Price Administration and which has just been adverted to, is not controlling in this case."

The same question has been up for decision time after time and, so far as our research discloses, has, each time, been decided in the same way. The other cases holding that OPA ceiling prices do not apply to the adjustment of insurance losses are: *Southern Railway Co. v. Farmer*, 74 Ga. App. 329, 39 S. E. (2d) 714; *Ross Produce Co. v. Thompson*, 236 Iowa 863, 20 N. W. (2d) 57; *Louisville & N. R. Co. v. Blanton*, 304 Ky. 127, 200 S. W. (2d) 133; *Brock v. Cato*, 75 Ga. App. 79, 42 S. E. (2d) 174; *Ablon v. Hawker* (Tex. Civ. App.), 200 S. W. (2d) 265; *Betts v.*

Hitchcock (Tex. Civ. App.), 197 S. W. (2d) 878; *Zemel v. Commercial Warehouses*, 132 N. J. L. 341, 40 A. (2d) 642; *Anstine v. McWilliams*, 24 Wash. (2d) 230, 163 P. (2d) 816; *Lym v. Thompson* (Utah), 184 P. (2d) 667; and *Fugate v. State*, 80 Okla., Cr. R. 200, 158 P. (2d) 177.

No other result is possible when it is realized, as stated by these cases, that the regulations of the Office of Price Administration themselves expressly provide that OPA ceiling prices shall not apply to the adjustment of insurance losses.

It is clear beyond debate that the appraisers exceeded the submission by attempting to determine the law, and erred, in rejecting defendant's cost for the box lumber, used in the box mill, and in deciding that the law required that lumber to be charged, and in charging it, to the box mill at the amount for which it could lawfully have been sold as box lumber, at the date of the fire, under OPA ceiling prices applicable to box lumber, and, in so exceeding the submission, and in so misdeciding this question of law, the appraisers deprived appellant of \$73,365.93.

The District Court remarked in his opinion (R. 112) " * * * that in making a claim against the insurer of the property destroyed by fire the defendant based its claim for the lumber destroyed on OPA ceiling prices, though the average cost was available." The court has failed to remember, or to understand, that the small amount of lumber which was burned, and for which claim was made under the direct fire policies, was in the process of being sawn in the sawmill, which burned, and that this lumber had not been sorted and, after it had burned, no one could tell what, if any, part of it would have been sorted and assigned as box lumber for cutting into, and sale as, box shook (R. 409, 410, 429), and therefore it all had to be treated *as lumber, for sale as lumber*, and having to treat it *for sale as lumber*, obviously, it could not lawfully have been sold for more than OPA ceiling prices applicable to lumber, and it was for that reason that it was included in the direct fire loss claim at what it would have brought, *as lumber*, and, on that matter, its cost was immaterial.

But, had it been box lumber, it would not have been intended to be sold, nor for sale, *as lumber*, under OPA ceiling prices or otherwise, but would have been intended to be sold, and for sale, only as *box shook*, and, naturally, in determining "profits" made by the box shook mill, under a use and occupancy policy, the *cost* of the box lumber—not what it could have been sold for, *as lumber*—would be the basically material factor.

In the District Court's opinion it is said (R. 109) "It is generally conceded that this" (OPA price) "was more favorable to the defendant than an allocated cost, if that could be determined."

The error of this statement lies in the failure to keep in mind the distinction between box lumber, as lumber, on the one hand, and box shook, on the other hand. The theory of allocated costs—and it is entirely a theory—is that the same rate of profit is to be realized from every product, and to produce that result selling prices are first assumed, and the total of all costs of all products are then apportioned or allocated to the several products on the basis of their assumed selling prices, and thus allocated costs are theoretically determined (R. 261, 262, 450, 451, 455). Therefore, if it be assumed that box lumber was to be sold *as box lumber* under OPA prices, then inasmuch as OPA prices *for box lumber* had been purposely fixed very much lower (to encourage the making of box shook) than for finished commercial lumber, allocated costs would be less than OPA prices *for box lumber* (R. 401). But, when we realize that appellant never did sell *box lumber* (its cost of producing it being \$8.51 per M more than OPA prices for it), but produced it only to be cut into and sold as shook, and look at the actual facts, we see that, in the test year, appellant's realization from all its finished commercial lumber was \$45.12 per M, but its realization for all its shook was \$51.90 per M (R. 413, 414), and therefore theoretical allocated costs for the *shook* would be a great deal more than OPA prices for *box lumber* and even more than appellant's actual cost for the box lumber (R. 392). Hence it is not correct to

say that the OPA price "was more favorable to the defendant than an allocated cost, if that could be determined."

But there is no point in discussing allocated costs because the appraisers did not use them. Moreover, it is obvious, and agreed by all, that when all the products have been sold and actual realizations are known you come out at the same place whether you use actual, or a theoretical, cost (R. 274, 415, 456). Here all the box lumber was actually milled into shook and all the shook was actually sold, and actual realizations were determined, before expiration of the loss period, and, of course, long before the proof of loss was filed, and therefore, having the actual facts, there is no excuse for theorizing what they might have been.

Judge Parker said, in his excellent opinion in the use and occupancy insurance case of *Fidelity Phenix Fire Ins. Co. v. Benedict Coal Corp.*, 64 F. (2d) 347, 352 (4th Cir.), that "such losses are to be determined in a practical way." These policies were to protect appellant against actual loss. To the extent it made actual profits in partial operations after the fire, it did not have actual loss. What profits did it actually make out of operations of the box shook mill after the fire? Its actual cost for the box lumber to the box mill door—without a penny's profit to that point—was \$39.86 per M. Its actual costs of cutting the lumber into shook and shipping and selling it were \$13.65 per M. It actually got for it \$60.22 per M. It, therefore, made an actual profit of \$6.71 per M or (\$6.71 X 8,828,644 feet) \$59,240.93, all of which it credited to the insurance companies. These are the undisputable actual facts.

Yet the appraisers, by ignoring appellant's actual cost for the lumber of \$39.86 per M, and by indulging a fictional sale of the box lumber—that was not for sale, and that appellant was not required to sell and did not sell, as lumber—at the OPA price, applicable to box lumber, or \$31.55 per M—or at \$8.31 per M less than appellant's actual cost for that lumber—calculated an increase (wholly

unreal) in the recovery from box mill operations from \$6.71 to \$15.02 per M, or by said \$8.31 per M, or (\$8.31 X 8,828,644 feet) \$73,365.93, which they further credited to the insurance companies, making a total credit to the insurance companies from partial operations of the box mill of 132,606.86, and thus visited an actual loss upon appellant in the amount of \$73,365.93, which did not in very truth occur and which it could never recover.

The submission did not authorize the appraisers to adjudge questions of law, but, on the contrary, it expressly withheld that power from them, and the appraisers were told, in writing, by appellees, that if they ran into questions of law, their findings "should be in such form and detail that either interpretation of the coverage or liability could be applied" by others. Yet they departed from the submission and applied their own notions that the law required that the box lumber be charged to the box mill at OPA ceiling prices, applicable to box lumber, and, following that theory of the law, they indulged a theoretical sale of the box lumber, as box lumber, under OPA ceiling prices, despite the fact they realized, as they testified, that this lumber was not for sale, as lumber, and that this price was substantially less than appellant's actual cost for the lumber. The law did not so require. It expressly prohibited this. By thus exceeding the submission and erroneously interpreting and applying the law, they made a palpable mistake to appellant's injury in the amount of \$73,365.93. One cannot profitably elaborate a truth so simple.

IV.

The court erred, as a matter of law, in holding that the appraisers properly added to annual values unreal depreciation on the destroyed sawmill for the year following its destruction by fire.

Numbered paragraph 4 of plaintiff's Exhibit B, the mimeographed part of the policies that provides the use and occupancy insurance, contains the following contribution clause:

“4. ‘CONTRIBUTION CLAUSE’—It is expressly stipulated and made a condition of this contract that, in the event of loss, this company shall be liable for no greater proportion thereof than the amount hereby insured bears to seventy-five per cent (75%) of the total of the net profits (ITEM I) and charges and expenses (as specified in ITEM II), which would normally have been earned during the period of twelve (12) months immediately following the fire.”

Though appellant, in using the figures of the agreed test year in computing profits prevented, as set forth in its proof of loss, naturally, gave effect to depreciation on its sawmill (that was destroyed by the fire), the appraisers, nevertheless, in their finding of annual values—but not in their finding of values in the nine months loss period—, included depreciation on the destroyed sawmill for the year following the fire, of \$15,042.17, thus reducing appellant’s claim, under application of this contribution clause, by more than \$8,000.00, when, in fact, and in law, no depreciation continued, or occurred, on the destroyed sawmill in the year following its destruction by fire.

The contribution clause of the policies only required inclusion in the values—both for the nine months loss period and for the one year period—, of “charges and expenses (*as specified in ITEM II*) which would normally have been earned during the period of twelve (12) months immediately following the fire,” which clearly means—see “ITEM II” of the policies—such “*fixed charges and expenses which must necessarily continue during a total or partial suspension of business.*” Of course, depreciation on the sawmill did not continue after its destruction by fire.

The same thing was tried by the insurance company in the case of *Fidelity-Phenix Fire Ins. Co. v. Benedict Coal Corp.*, 64 F. (2d) 347, 353, and the court disposed of the point as follows:

“And we agree with the learned judge in his dealing with depreciation and depletion under the heading of fixed charges. Depreciation on property which

has been destroyed is not to be allowed as a fixed charge, even though it must be considered in estimating profits which would have been earned if the business had gone on; for manifestly property which has been destroyed cannot depreciate.”

Though appellant, in the computation of its profits prevented, had, necessarily, by using the figures of the agreed test year, given effect to depreciation on the sawmill—in both the nine months loss period and in the year period—, the appraisers, nevertheless, in their finding of annual values—but not also in their finding of values for the nine months loss period—, included a fictional depreciation on the destroyed sawmill which did not occur, and, thus wrongfully increased annual values by \$15,042.17, which deprived appellant, under application of the contribution clause, of more than \$8,000.00. This was clear error of law, to appellant’s prejudice in that amount.

To demonstrate, in simple terms, how this error of the appraisers, in construing the policies, and their coverages, penalized appellant, we will set down the figures, and apply them under the formula of the contribution clause.

The proof of loss shows:

	<u>Insured Period</u>	<u>Annual Period</u>
	7-8-45 - 4-7-46	7-8-45 - 7-7-46
Profits prevented ITEM I	\$266,241.60	\$358,458.56
Continuing Costs ITEM II ...	\$538,927.93	\$646,190.47
	<hr/> \$805,169.53	<hr/> \$1,004,649.03
Less profits from partial operations—Sch. III	(63,165.12)	
	<hr/> \$742,004.41	

Application of “Contribution Clause”

75% of \$1,004,649.03 equals \$753,586.77

\$753,586.77 into \$742,004.41 equals 98.4631%

98.4631% X (ins) \$651,000.00 equals \$640,994.78.

The above figures in the proof of loss representing “profits prevented” were the results after all deprecia-

tion, including depreciation on the sawmill of \$11,281.62 for the nine months, and \$15,042.17 for the year, had been deducted. If those amounts had not been there deducted the figures respecting profits prevented would have been \$277,523.22 for the nine months and \$373,500.73 for the year.

ITEM I of the insuring clause insured the profits prevented. ITEM II of the insuring clause insured the charges and expenses "which must necessarily continue" after the fire. Depreciation did not continue on the destroyed mill after it was burned, and therefore should not have been included (and was not included by appellant, either in the figures for the nine months or for the year) in the insured charges and expenses that "must necessarily continue" after the fire.

The appraisers added to the annual values (but nothing to the nine months values) the sum of \$15,042.17 as depreciation on the sawmill in the year after the fire.

The effect of this is to alter the figures thus:

	Insured Period	Annual Period
Profits prevented ITEM I	\$266,241.60	\$358,458.56
Continuing costs ITEM II	538,927.93	646,190.47
Here insert the appraisers error		15,042.17
		<u>\$1,019,691.20</u>
Less profits from partial operations—Sch. III	(63,165.12)	
	<u>\$742,004.41</u>	

Application of "Contribution clause"

75% of \$1,019,691.20 equals \$764,768.40

\$764,768.40 into \$742,004.41 equals 97.234%

97.234 X (ins) \$651,000.00 equals \$632,993.34.

Hence the amount of appellant's recovery is reduced by that error, of including depreciation on the destroyed sawmill, in the amount of \$15,042.17, for the year following the fire, and which depreciation did not, of course,

continue, by the difference between \$640,994.78 and \$632,993.34, or by \$8,001.44.

It seems clear enough that the policies only required inclusion, in these values, of "charges and expenses (as specified in ITEM II) which would normally have been earned during the period of twelve months immediately following the fire" and this means, as recited in ITEM II, such "fixed charges and expenses which must necessarily continue." But even if there be any doubt about it, certainly the policy is subject to that interpretation, and "where the provisions of an insurance policy are subject to two or more interpretations, that which is adverse to the insurance company must prevail." *General Insurance Co. v. Pathfinder Petroleum Co.*, 145 F. (2d) 368, 370 (9th Cir.).

We contend that inasmuch as ITEM II of the insuring clause of the policies limits inclusion in continuing charges and expenses to those "which must necessarily continue," that there is no basis for including a fictional depreciation on the sawmill after it was destroyed by fire, *but this much is true to a moral certainty*, if a fictional depreciation on the destroyed sawmill is to be included in the one year's charges and expenses ("that must necessarily continue"), even though it did not continue, then 75% of it would have to be included in the nine months period and the figures then would be:

	Insured Period	Annual Period
Profits prevented ITEM I	\$266,241.60	\$358,458.56
Continuing costs ITEM II	538,927.93	646,190.47
Add depreciation on burned mill	11,281.62	15,042.17
	<u>\$816,451.15</u>	<u>\$1,019,691.20</u>
Less profits from partial operation—Sch. III	\$ 63,165.12	
	<u>\$753,286.03</u>	

Application of "Contribution Clause"

75% of \$1,019,691.20 equals \$764,768.40

\$764,768.40 into \$753,286.03 equals 98.498%

98.498 X (ins) \$651,000.00 equals \$641,221.98.

Hence, if the appraisers had been consistent in their error, in construing this provision of the policies, appellant would have received, through the error, more than it claimed, to the extent of the difference between this \$641,221.98 and the \$640,994.78, computed under its proof of loss, or \$227.20, and would have received \$8,228.64 more than found by the appraisers.

We believe this demonstrates to a mathematical certainty, that the appraisers exceeded the submission in attempting to construe the policies and that they erred in their construction of the policies, in this respect, to appellant's injury in the amount of \$8,001.44.

Before concluding, we desire to make mention of the fact that the court, in his opinion, says that the total of the claims about which appellant complains do "not exceed 15% of the total claim" (R. 104). This argument was made to the court by appellees numerous times during the trial, but, believing the matter unworthy of any serious consideration, we made no reply. But, now that the court has accepted the figure and remarked of it, we want to answer briefly.

The amount about which appellant is complaining is (excess logging costs, log decking expense and log depreciation, \$91,439.34, less the \$25,000.00 compromise allowance, or \$66,439.34, plus the erroneous increase in box mill profits of \$73,365.93, plus the erroneous inclusion in annual values of depreciation on the destroyed sawmill of \$8,001.44) the sum of \$147,806.71. The amount of loss in the nine months insured loss period, as set forth in the proof of loss, was \$742,004.41. The amount appellant is complaining about of \$147,806.71 is 19.92% of the amount set forth in the proof of loss. But, when the proof of loss goes through the formula of the contribution clause, the real amount of the claim as set forth in the proof of loss became \$640,994.78 and the amount appellant is here complaining about of \$147,806.71 is 23% of that amount. The amount payable under the appraisers' award, after application of the contribution clause, is \$491,379.41 and the

amount which appellant is here complaining about of \$147,806.71 is 30% of that amount.

Whatever the percentages, \$147,806.71 is, to us, a very substantial sum of money, and appellant, having bought and paid for insurance that covered it, thinks it is entitled to collect it.

Conclusion.

In conclusion, we respectfully submit that, for each and all of the foregoing reasons, the judgment of the District court should be reversed and appellant allowed to proceed to try its case before a jury under Count II of its counterclaim.

Respectfully submitted,

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No. 12,491

IN THE
United States Court of Appeals
For the Ninth Circuit

PICKERING LUMBER CORPORATION
(a corporation),

Appellant,

vs.

THE AMERICAN INSURANCE COMPANY,
et al.,

Appellees.

BRIEF FOR APPELLEES.

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PICKERING LUMBER CORPORATION

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et al.,

Appellees.

BRIEF FOR APPELLEES.

STATEMENT OF CASE.

This is an action in declaratory relief brought by a number of insurance companies (appellees) against the insured (appellant) to whom they had severally issued contracts of use and occupancy or business interruption insurance on California statutory standard form fire policies. After a fire the parties were unable to agree on the amount of loss, and a reference to determine the amount was held as provided in the policies. The referees rendered a unanimous award under which the amount payable by appellees was \$491,379.41; appellees advanced \$250,000 to appellant

at its request before the award was made. Appellant refused to accept the award, and claims to be entitled to the full amount of insurance stated in the policies (\$651,000), less of course the advance payment.

By this action appellees have asked for a declaration that the award is valid and binding upon the parties; alternatively (should the court decree otherwise) appellees ask that the court determine the amount due to appellant. After trial upon the issue of the validity of the award, the trial court made findings of fact and conclusions of law upholding the award. This disposed of the entire case, and judgment was entered decreeing that appellees (severally, in proportion to the amounts of their respective policies) pay to appellant the difference between the amount payable under the award and the sum advanced.

Appellant's "Statement of the Case" consists of some general statements concerning the nature of appellant's operations before and after the fire, the insurance policies (pp 1-7), the adjustment procedures, and the reference and award (pp 14-17). With this portion of the brief we have no quarrel, but would note that it is incomplete in respects which will be hereafter pointed out. The "Statement" also discusses in some detail the factual aspects of the case involved in the second specification of error (pp 8-10, 18-20) relating to the so-called "compromised" items; in the third specification of error (pp 11-14, 21-22) relating to the box factory profit; and in the fourth specification of error (pp 22-23) relating to insurable values. This portion of the "Statement" is largely

repetitive of material contained in the "Argument" section of appellant's brief. It is incomplete and inaccurate, as we shall point out. However, in order to avoid repetition, we shall treat of these matters in the argument directed to each of the particular specifications of error.

THE ISSUES.

Underlying appellant's entire appeal, as well as its entire attack on the award, is the contention that the reference proceeding was not an "arbitration" in which arbitrators have "power to conclude, even mistakenly, both the law and the facts by their award" (p 33¹), but was an "appraisal" in which appraisers are not empowered "to interpret the policies and decide such and other questions of law" (pp 30, 36), and while their "findings of the amount of loss . . . are binding" (p 36) they have no power to decide or determine "the amount due . . . under the policies . . . with finality" (pp 28, 30).²

¹Unless otherwise noted, page references preceded by "p" or "pp" are to pages of Appellant's Brief. References to the Transcript of Record will be preceded by the letter "R". Emphasis in all quotations is ours.

²For this reason we shall refer to the loss-determination proceeding as a "reference" rather than "arbitration" or "appraisal", and to the arbitrators or appraisers as "referees"; except of course in those portions of the brief dealing with technical legal distinctions between "arbitration" and "appraisal".

As a matter of fact, these terms are used interchangeably in regard to insurance policy loss reference proceedings. See, for example, 6 *Appleman, Insurance Law*, s 3921 ff; 45 *CJS* 1352 (Insurance, s 1110 ff, dealing with "Appraisal and Arbitration"); 29 *AmJur* 926 (Insurance, s 1240 ff); 7 *Permanent ALR Digest* (1950), Title "Insurance", § 609 ff.

I. The first specification of error raises a pure question of law, which may be stated as follows: Are referees, appointed to determine the amount of loss pursuant to the provisions of a California statutory standard form fire insurance policy empowered to interpret the policy and to decide "such and other questions of law" and "the amount due under the policy" with finality, if that interpretation and those questions are implicit in and incidental and necessary to a determination of the amount of loss sustained?

The second, third and fourth specifications involve factual considerations relating to five specific items of the loss claim, and the treatment of these by the referees.

II. Appellant made claim in its proof of loss for alleged excess logging costs, decking expense, and log depreciation or deterioration, in the total amount of some \$91,000. The referees allowed \$25,000. Appellant contends that this was a "compromise", and as such an improper discharge of and departure from the submission.

III. Operation of the box factory during the loss period after the fire resulted in a profit to appellant which reduced the loss payable *pro tanto*. Appellant is dissatisfied with the basis upon which the referees calculated the amount of this profit, more particularly with the basis upon which the referees costed box lumber into the box factory operation. Appellant contends that in adopting this basis the referees exceeded and improperly discharged the submission.

IV. In addition to determining the amount of loss, the referees had submitted to them for determination and did determine the value of the subject of insurance—that is, the total amount of insurable values covered by the policies. This submission was in accordance with the policy terms,³ and was necessary in order that the contribution or coinsurance clause (Ex B, § 4; R 33) might be applied in determining whether all or only a portion of the amount of loss found by the award was payable.⁴ The referees included in the insurable values depreciation on the burned sawmill, and appellant contends that this was error.

³In referring to the policy provisions for reference, appellant mentions only the printed portion of the policy entitled “Ascertainment of amount of loss” (Ex A; R 24 ff). There is, however, another pertinent provision that is contained in the endorsement attached to each of the printed policies, and reading as follows (Ex B; R 14):

“It is a condition of this insurance that in case the insured and this company are unable to agree as to the time necessary to rebuild, repair, or replace the described property, and/or the value of the subject of this insurance, and/or the amount of loss thereon, the same shall be determined by appraisal in the manner provided by this policy, the provisions of which policy shall govern in all matters pertaining to this insurance except as herein otherwise provided.”

⁴In this case there was a coinsurance penalty. The award fixed the amount of the loss at \$581,000 plus \$1,760 (Complaint, XI, R 10-11; Answer, XI, R 50-51), but the amount payable (assuming the award to be correct) was \$491,379.41 (Complaint, XII, R 11-12; Answer, XII, R 51).

ARGUMENT.

Appellees have consistently contended that the assault on the award framed by the allegations of the answer and counterclaim is without legal sufficiency.⁵ This is still our position. We further contend that, regardless of the sufficiency of appellant's pleading, the record wholly fails to sustain appellant's burden of establishing invalidity of the award; and that neither the referees nor the trial court erred in any of the respects noticed by appellant.

I. THE AWARD AND THE REFEREES.

The relative insignificance of the alleged "errors" in the award about which appellant is complaining is striking, appellant to the contrary (p 64) notwithstanding. The proof of loss (Ex D) filed by appellant set forth literally hundreds of items taken from its books or otherwise calculated involving insurable values in excess of \$1 million, and an alleged loss of over \$742,000. Only *five* of all these items upon which the referees had to pass are within the scope of appellant's attack on the award. The largest "mistake" involves the three so-called "compromised" items which are the subject of appellant's second specifica-

⁵We may also note (as we pointed out to the trial court in motions to strike) that the purported "counterclaims" are not really counterclaims at all under any proper rule of pleading, since they re-plead purely defensive matter pleaded in and available under the answer to the complaint. However, we do not urge the matter here, since it involves a purely formal question of procedure.

tion of error,⁶ amounting together to less than 9% of the loss claimed. The other two amount to 6.6%⁷ and 1.1%,⁸ respectively. In all, these five items resulted in an alleged total "inadequacy" in the award of 16.6% of the loss claimed. Looked at from this point of view, and bearing in mind that the referees had to resolve a great many disputes between the parties some of which were decided in favor of one side and some in favor of the other,⁹ it can be seen that appellant has little of weight to complain of. Resolution of differences by a board of referees in a matter of this magnitude involving so many and such complex problems, and which resulted in an award varying so slightly when viewed as a whole from the position taken by one of the parties, is a process that must be said to have concluded quite favorably to that party.

Appellant does not impugn the qualifications or competence of any of the three referees; indeed, it is clear that they were exceptionally well chosen for the difficult task of unraveling the intricacies of this

⁶Appellant's Brief, p 64.

⁷This is the item of box factory profit treated in appellant's third specification of error. Appellant's brief (p 64) states this alleged "error" at \$73,365.93. Actually, the net difference between the figure claimed by appellant and that arrived at by the referees was about \$49,000, after taking into consideration allowances for expense items not claimed by appellant in the proof of loss. (See: Herriek's Finally Revised Computation, Ex 7, p 4, § 7; Opinion of trial court, R 105.)

⁸This is the item of depreciation on the sawmill treated in appellant's fourth specification of error.

⁹R 333-5; Opinion, R 104, § 6.

claim.¹⁰ Appellant does not question the spirit in which the referees approached and consummated a solution of the problems submitted to them; it is conceded that they were free from bias and partiality, and acted at all times in a fair and equitable frame of mind, attempting and intending to do full justice between the parties.¹¹ Appellant does not argue that the referees acted with less than a complete knowledge of all pertinent information; it is undisputed that both sides were permitted to and in fact did place

¹⁰Mr. Anson Herrick was the referee chosen by appellant. The senior partner of Lester, Herrick & Herrick, he was a man of 40 years experience in the profession of public accountancy (R 466-7). Appellees nominated Mr. Frank Maloney of Sacramento, a building contractor (R 592). The umpire or third referee, selected by the other two, was Mr. Lewis Lilly, senior partner of the accounting firm of McLaren Goode & Co. (R 331). Appellant agreed (R 331) that these two accounting firms rank among the outstanding certified public accountants in this area.

It was Mr. Herrick who suggested to Mr. Maloney that Lilly be chosen as umpire; he was Mr. Herrick's first choice (R. 552):

"Q. As a matter of fact, it was you, was it not, who suggested the name of Mr. Lilly as umpire? A. Yes. * * *

Q. * * * You suggested Mr. Lewis Lilly as your first choice, Mr. Addison Strong, of Hood and Strong, as your second, and Mr. Rollin P. Rodolph, of Rollin P. Rodolph Company, as your third choice? A. Right.

Q. Those firms are all certified public accounting firms, are they not? A. Right.

Q. Did Mr. Maloney suggest any umpires? A. Yes.

Q. Were there any common names on your respective lists? A. No.

Q. So that the selection of Mr. Lilly was a selection of * * * one of the three chosen by you? A. Right."

(It is significant that appellant's referee was quite definite in wanting,—and successful in getting,—a certified public accountant as the third referee or umpire. And it is interesting to note that Mr. Rollin P. Rodolph, who testified at the trial as an expert witness for appellees, was one of the men proposed by Mr. Herrick for the post of umpire in the reference.)

¹¹Opinion, R 103.

before the referees all data and arguments which either side wished to present (R 328-9, 561-3). Nor does appellant point to any newly discovered facts or arguments that might have changed the result if known to the referees; to the contrary, it was admitted at the trial that no fact and no argument was presented to the court that had not been placed before the referees.¹²

It is significant, too, that the referee appointed by appellant (Mr. Herrick) not only named the third referee or umpire (See footnote 10, *supra*), but he (Mr. Herrick) also took the dominating part throughout the reference proceeding.¹³

The three referees, after hearing both parties and after careful deliberation, rendered a unanimous award. Although appellant took and introduced into

¹²Apart from the depositions of the three referees, appellant rested its case at the trial on the testimony of a single witness, Mr. Frank Momyer, its treasurer and auditor. Upon completion of his direct examination, counsel for appellees examined him as follows (R 247):

“Q. * * * I should like to ask you * * * whether it is not a fact that all of the points and arguments that were brought out in connection with these various items on your direct questioning * * * were also brought out in the appraisal, and were presented by your company, or by yourself to the appraisers. A. I am not sure that all of them were, I think substantially that they were.

Q. Do you recall any matter of fact that you testified to * * * that was not presented to the appraisers * * *? A. I can't say that I do.”

¹³R 553 (Deposition of Mr. Herrick):

“Q. (By Mr. Levit): It was necessary as a practical matter for one of the appraisers to take the lead in analyzing these figures and analyzing the points of agreement and disagreement among you (that is, among the referees), and

evidence the depositions of each of the three referees (R 493 ff); and although after the award was made and appellant had expressed its dissatisfaction and intent to contest it, Mr. Herrick wrote two letters to appellant's attorney, commenting upon the award and upon appellant's objections to it;¹⁴—at no time did appellant succeed in getting any one of the three referees (not even the one appointed by appellant!) to state that the award was other than fair and equitable to both sides.

If this award can be nullified on grounds as unsubstantial as those urged here in the face of the record made on the trial, then an insurance reference to fix the amount of loss after disagreement between the parties is worthless. It is even worse than worthless, because it will be likely to entrap either insured

analyzing the various possibilities and contentions, was it not?
A. Right.

Q. And it is a fact, is it not, Mr. Herrick, that you actually took the lead in those matters? A. That's right.

Q. That was true during the entire time of the appraisal, and up to and including the time of the award, was it not?
A. That's right.

Q. That was done, I take it, with the full consent and approval of the other two appraisers? A. Right.

Q. It is a fact, too, is it not, that in an appraisal of the size and complexity of the one here involved, there were necessarily many points that had to be discussed at considerable length and written out? A. Right.

Q. And someone had to take the initiative in framing and bringing together the varying viewpoints? A. Right.

Q. And in this case and during this proceeding, you took that initiative, did you not, largely? A. Yes, at least up to the point of the umpire being brought in."

¹⁴See Mr. Herrick's letter to Judge Barnett of 14 May 1947 (Ex R); and Mr. Herrick's letter to Judge Barnett of 1 March 1948 (Ex S).

or insurer depending upon which of the two is dissatisfied with the result (and one or the other often is); and because loss reference proceedings will become the beginning, instead of the end, of litigation.

As Mr. Herrick (appellant's referee) said in one of his letters to counsel for appellant written long after the award was made (Ex S):¹⁵

"In writing this letter I do not mean to infer any modification of my approval of the findings of the appraisers in (this) matter. As I have explained to you orally, in a situation such as this there is no specific amount which can be asserted to be the correct valuation and that all others are wrong but rather that there is an area within which any amount is appropriate of designation as a fair valuation. The valuation found by the appraisers was in my opinion within that area."

II. POSTFIRE LOGGING EXPENSES—THE "COMPROMISE"

(Specification II).

There are three items involved in this contention of error. These relate to logging done after the fire allegedly for the sole benefit of appellees to reduce the loss: (a) Excessive logging costs, (b) Log "depreciation" (rot, stain, etc.), and (c) Increased cost of

¹⁵The letter mentioned was written by Mr. Herrick to Judge Barnett at the latter's request on 1 March 1948, nearly a year after the award was made and months after this suit was filed. It was written to give to appellant such assistance in contesting the award as Mr. Herrick as a professional man of integrity could give. As the letter says:

"* * * As the corporation (appellant) has chosen to contest the findings (of the referees) it is appropriate for me to give you such information and views as might be helpful in obtaining its (appellant's) objectives."

yard and mill operation. The proof of loss sets up these items in the total amount of \$91,439.34; the referees allowed \$25,000.

One gets the impression from reading appellant's brief that appellant is making the point that the award should have been set aside because it was *inadequate* in the amount of the difference between these two figures. However, we submit that appellant's second specification of error (II) does not raise the issue of financial inadequacy in the award as to these items. Moreover, appellant did not seriously contend at the trial that the amount of \$25,000 allowed by the referees for these three items was inadequate. Indeed, when we attempted to cross examine Mr. Momyer as to the figures, appellant's counsel pointed out that the issue was not with respect to adequacy of the amount allowed, but was limited to supposed procedural defects in the way the referees conducted themselves.¹⁶

¹⁶As appellant's counsel said (R 360-364):

"Mr. Whittaker: If the court please, on this line of questioning I believe we have unnecessarily taken up the time. *The question is with respect to this matter, not whether the appraisers found a correct amount.* The question is, did they discharge the submission . . . or . . . did they exceed the submission with respect to extra charges . . . Mr. Levit is attempting to . . . show that the appraisers over all determined a result as a matter of fact. Whereas my point is that to meet any such effort would require a trial by us of the whole case, whereas the issue here is . . . whether or not the appraisers in doing what they did in those particular circumstances exceeded the submission or failed to discharge it. . . Now he (Mr. Levit) was asking him (Mr. Momyer) about the extra logging costs . . . *and my point . . . is . . . that it isn't a matter that we should be here concerned about, because the appraisers didn't find any amount, and the error is that they failed to find any fact as to the amount of the extra logging costs, but compromised it.*"

A. Appellant's "facts".

Appellant fixes the amount of its alleged excess logging costs at \$3.60253 per M, or a total of \$40,715.40 (p 8), to which is added \$2,081.64 (p 10) to get the total of \$42,797.04 (p 37). These figures it has attempted to "sell" to the court as a sort of ineluctable statistic. The answer of appellant states (Counterclaim I, par XIV, R 65-66):

"Said (additional logging) expenses *were not estimated*, but were *actually incurred*, the *actual amount* thereof was *correctly entered* upon defendant's books, and the correctness of said figures *was not disputed or questioned* by the appraisers . . ."

Appellant's brief says that the referees "accepted" these figures (pp 18, 19, 38); that "There was no dispute before the appraisers about the figures" (p 37); and that they acted "without making any kind of computation and without finding the amount of these items" (pp 20, 38), and "without submitting the matters to the umpire" (pp 20, 38).

All of this is quite at variance with the record made at the trial.

It was proven that appellant did not really try to defend the accuracy of the \$3.60 rate at the hearing before the referees. According to Mr. Herrick's notes of the testimony given at the reference hearing by Momyer (Ex T):

"Upon question by Herrick as to why the rates of \$21.91 and \$25.51 had been used to develop the excess average cost after June 30 of \$3.60 while

the average for the entire operation of \$23.45 . . . had been used in Schedule R-6, he (Momyer) *conceded that the question of whether the \$3.60 rate was excessive was an open one.*"¹⁷

It was also proven that the referees found that appellant's claim for excess logging costs was "*palpably excessive*".¹⁸ The most that Momyer was able to say in his trial testimony was (R 375) that appellant gave the referees—

"the best estimate we knew about. *Mr. Herrick questioned it* and I have said he has a right to his opinion, but we presented the best evidence we knew how to present and that is all I can say on it."¹⁹

Mr. Herrick also testified (R 550) that the matter of logging overhead and logging costs *was* submitted to the umpire. While Mr. Lilly (the umpire) was doubtful on this point, as appellant points out (p 20, n 23), he did testify that the amount of \$25,000 "was agreeable to me" (R 580).

In general, the same comments as to the contrast between appellant's assertions and the evidence in the record apply to all of these "compromised" items. All are put forward by appellant as gospel, not only

¹⁷At the trial, Momyer admitted that Herrick's notes as quoted above were accurate (R 375).

¹⁸The memorandum prepared by Mr. Herrick just prior to the signing of the award, which states the conclusions agreed to by all the referees, says (Ex V): "The excessive logging cost which had been claimed . . . *was palpably excessive.*"

¹⁹Apparently appellant's "best" was none too good, for Mr. Herrick calls it a "guess", and says (Ex V): ". . . *There had been no adequate evidence with respect to this.*"

unquestioned by the referee believers, but indeed unquestionable. As the answer alleges, relative to all three of these items (Counterclaim I, par XVI, R 66-67):

“All (of said alleged ‘errors’) had to do with matters which actually occurred, the amounts of which had been *definitely ascertained* and correctly entered upon defendant’s books . . . *None occurred as to any item, the amount of which is a mere matter of estimatiton or judgment . . .*”

But compare this with Momyer’s testimony at the trial, with reference to the alleged amount of log stain and rot (R 368):

“Q. So that it was obviously and of necessity an estimate, wasn’t it? A. *It would have to be an estimate, certainly.*”

And consider also the testimony elicited from Mr. Maloney (referee) by appellant on deposition (R 606-610):

“Q. Do you remember whether or not the appraisers accepted that estimate (amount of log stain) from those experts? A. I personally didn’t accept it. I thought it was *excessive* . . .

Q. . . . But you are sure that you didn’t accept the figure of \$36,149.95 as the amount of the log stain? A. *That I did not. Correct* . . .

Q. Do I understand that you were not satisfied with the method by which they (appellant’s experts) estimated it? A. *I was not.*

Q. Do you remember what it was that you thought was wrong about it? A. *I thought it was excessive.*”

Despite all this, appellant is still blandly asserting in its brief (as has been noted) that the referees "accepted" all of these figures put forward by appellant's proof of loss.

Appellant says that Mr. Herrick "held the view" that the loss of worth in the logs was "deterioration" and not "depreciation" as the latter term is used in the policies (p 38); that this was an error of law, because the two terms are synonymous (p 40); and that he (Herrick) thought it not "insured by the policies" (R 19).

Here appellant again falls into conflict with the evidence. It is true that Mr. Herrick considered the log stain not to be "depreciation" as the term is used in Item II of the policies.²⁰ In this he was undoubtedly right; and Momyer confirmed his conclusion by testifying (R 355-6) that appellant set the stain loss up in its proof of loss as "an abnormal loss due to conditions that existed after the fire", and that it was not included in the base upon which appellant calculated total insurable values for purposes of the contribution clause.²¹ However, it is *not* true that Mr. Herrick held the view that log stain was not covered by the policy. Let Mr. Herrick speak for himself (R 540-1):

²⁰Item II of the policies refers to depreciation as one of the "fixed charges and expenses which must *necessarily* continue during a total or partial suspension of business" (Ex B).

²¹We agree that appellant was correct in this treatment. But if the log stain *were* depreciation within the meaning of Item II, then it would have been erroneous to omit it from the contribution clause base. Since it was not a necessarily continuing item but rather an "abnormal" one, it was not "depreciation" in the sense that Mr. Herrick and the policies used the term.

“The so called log stain was designated in the claim as depreciation; and if you will pardon me for saying so, Judge (Barnett), that was not true. It was not a depreciation as the term is understood. It was a deterioration, *which was not a continuing expense*. If allowable, it would be what we call *expediting expense*.²² And if allowable as an expediting expense, *would not have been controlled in my opinion by the coinsurance provision . . .*

Q. By the coinsurance provision, you are talking about that Section 4 . . .? A. Yes, the contribution (clause).

Q. All right . . . Now, *did you consider that claim?* A. *That entered into the allowance of \$25,000 . . . The excessive logging costs and the stain . . . And the decking.’’*

Mr. Maloney, too, made it plain that the referees did not reject the log stain claim because they deemed it not allowable under the language of the policies, or for any other reason for that matter; but rather that an allowance *was* made for it (R 605-6):

“Q. . . . You allowed \$25,000 on account of Pickering’s claim for excessive logging costs, log stain, and log decking? A. Yes . . . It was a question of our best judgment, taking into consideration the testimony as we heard it . . . The question was as to the actual loss in regard to the stain over a nine-months period. There was many factors involved, and they were all considered; and there was a lot of time put in on that

²²The reference here is to Section 5 of the policies (Ex B, R 33) which provides that the insurers shall be liable—

“for such expenses as may be incurred for the purpose of reducing any loss under this policy, not exceeding, however, the amount in which the loss is so reduced.”

. . . It wasn't just a snap shot of \$25,000 . . . It was considered from all angles to our best judgment; and that was the fair amount for that particular item.²³

Q. Then you didn't throw out excessive logging costs? A. No.

Q. Nor the log stain? A. No.

Q. Nor the log decking? A. No."

Mr. Herrick summed up the entire matter as follows (R 531-3):

" . . . The appraisers allowed \$25,000, a round amount, to cover *all of the claims* embraced within those four items.²⁴ . . . (It was) the result of long debate . . . I can simply say that (it) was the result of the combined judgment of the appraisers . . . There were days and days of discussion and debate with respect to that and many other things; and the \$25,000 was the final figure that was agreed upon *as an allowance on account of all of these claims.*"

That the appraisers did, contrary to appellant's assertion, do the best they could to compute the proper amount to be allowed on these items is shown by the evidence. In Mr. Herrick's letter to appellant's attorney (Ex R) he speaks of the claim for excess logging costs "recomputed as I think it should be". And all the referees were in accord that (Ex V):

²³Compare, umpire Lilly's testimony (R 578):

" . . . That allowance on the claim for log stain and excessive logging costs, I think I was in agreement with . . . that . . . \$25,000 figure that we had there . . . I can't give you the makeup of that. No, that was a decision based on the equities as I saw them."

²⁴Mr. Herrick refers to the three items we have been discussing, plus a minor credit item of grazing rentals (\$1461).

“ . . . A reasonable claim (for excess logging costs) probably would not have been more than \$15,000 to \$20,000. However, as the result of a contention that there should be some reasonable allowance for stain loss and . . . decking, an amount of \$25,000 was finally conceded . . .

The stain loss . . . was one of the factors entering into the allowance of a \$25,000 deduction from logging salvage. That deterioration took place was undeniable but it also is true . . . that, after allowance of a larger excess logging cost, there was an accumulation of profit in such logs which was realized after the termination of the loss period.”

Appellant speaks of the \$25,000 figure as an “arbitrary” allowance (pp 20, 38, 39). And so it was. But it was “arbitrary” only in the primary and etymological sense of the word; that is, it was determined by the judgment of arbiters rather than by rule.²⁵ Appellant uses the word as synonymous with “capricious”—a secondary meaning not applicable here.²⁶

B. Appellant's law.

The cases cited by appellant (pp 42-46) will be treated briefly.

(1) *St. Paul F&M Ins Co v Eldracher* (CCA 8, 1929) 33 F2 675 is, says appellant (p 42), “a case

²⁵*The Century Dictionary*, vol. 1:

“arbitrary . . . L. *arbitrarius*, of arbitration, hence uncertain, depending on the will, from *arbiter*, arbiter, umpire . . . 1. Not regulated by fixed rule or law; determinable as occasion arises; subject to individual will or judgment; discretionary . . .”

²⁶*The Century Dictionary*, vol. 1:

“arbitrary . . . 5. Ungoverned by reason; hence, capricious . . .”

almost exactly in point". It involved a fire insurance policy award that was attacked on the ground that it—

“did not express the judgment of the appraisers, but was made solely for the purpose and in the belief that it would be acceptable to both parties as a basis for settlement.”

The award was held invalid by both trial and appellate courts because it was shown that the appraisers could not agree and finally made their award in amounts selected “as the basis on which the loss could be settled, in the belief that both parties would be satisfied” (p 679):

“He (one of the appraisers) . . . received the impression that both sides would be willing to settle for \$55,000; . . . (the appraisers) never agreed on sound value or damage; . . . they figured out (plaintiff) would receive approximately that amount (from the figures they decided to use in the award), and their award was so made in the belief that this would be an acceptable basis of settlement, and . . . they signed it for that purpose. Clearly this was an abandonment of any further effort to comply with the authority under the submission, and the award which they signed was in the exercise of power not conferred upon them.”

The *Eldracher* case is exemplary; we commend it to the Court, because (among other things) the court agrees with us that, as to “compromise” by referees—

“The true rule on the subject is stated, we think, . . . in *Duke of Buccleuch v Board* . . .”²⁷

²⁷q. v., *infra*, subdivision C, “The merits”.

There is not the remotest connection or similarity between the evidence upon which the award was invalidated in the *Eldracher* case, and the facts of the instant case. Here, the referees labored long and conscientiously to arrive at an award on the basis of the facts presented to them; at no time did they depart from those facts in order to try and "please" the parties or either of them; and, as we have pointed out, at no time did appellant succeed in getting even one referee to admit that the award was not fairly and factually arrived at.

As Mr. Herrick said (R 567-8):

"Q. Mr. Herrick, did you, and to your knowledge, the other appraisers, give careful and full consideration to all of the evidence, both oral and documentary, that was produced, and to all of the contentions made on the various points in dispute by both sides before arriving at your award?

A. That was our intention; and it was believed that we did.

"Q. You believed that you did? A. Yes.

"Q. And you believe that the others did also, do you not? A. . . . Yes, my opinion is that they did."

In his first letter written after the award to appellant's counsel (Ex R), Mr. Herrick wrote:

"As I told you this morning, it is nearly impossible for me to recite all of the considerations during the very lengthy conferences which led finally to the . . . determinations (of the award) which as you know constituted a unanimous agreement."

(2) *Holker v Parker* (1813) 7 Cranch (11 US) 436, 3 LEd 396, is cited by appellant (p 44) to establish that “a compromise wearing the dress of an award” and where “the judgment of the arbitrators has (not) been exercised” is not an award at all. Appellant, unfortunately, has not understood the decision which, it must be admitted, is somewhat involved. The “compromise” to which the opinion refers was made between two attorneys representing the parties to the controversy; the arbitrators themselves had nothing to do with it, except that they proceeded to enter an “award” in the amount agreed to by the attorneys and did not attempt to arbitrate or consider the facts of the controversy at all. The “award” was set aside, since it was not an award at all “but a compromise between the attorneys”, which, said the court, Attorney Lowell had no authority to make.²⁸

(3) *Lee v Ins Co.* (Mon 1928) 266 P 640, cited by appellant (p 44), did not involve any question of compromise. That the *Lee* case is not authority for any doctrine contrary to the settled rules applicable to reference awards appears from the fact that it was cited with approval in this Circuit in *Polley's Lumber Co v US* (CCA 9, 1940) 115 F2 751, a case involving a reference governed by Montana law. This Court there said:

“In the absence of bad faith, or of mistake so gross as to imply bad faith or the failure to

²⁸The “Mr. Lowell” to whom reference is made in the portion of the opinion quoted by appellant (p 44) was *not* one of the arbitrators. He was the *attorney* for one of the parties involved in the arbitration.

exercise an honest judgment, the appraiser's estimate is to be taken as *conclusive*. (Citing the *Lee* case.) . . .

Appellants . . . went no further than to claim that the method of arriving at his estimate was unreasonable and unsound . . .”

The award was upheld

(4) *Ciresi v Ins Co* (Minn 1932) 244 NW 688 (p 45), likewise did not involve any question of compromise. The *Ciresi* case was correctly decided. An automobile was stolen, and recovered in a badly deteriorated condition. The cost of repairs was \$201, and this amount was awarded upon a reference under a theft policy. Plaintiff objected to the award on the ground that the automobile, even after it was repaired, was worth at least \$600 less than when stolen because of general depreciation not made good by the repairs. The referees thought that this was not recoverable under the policy; one of them said that he would have allowed an additional \$600 had he understood that he could legally do so. Here was a gross error,—one so prejudicial to the insured that the loss was from three to four times the award; and the mistake should have compelled vacation of the award, whether it were one of fact or of law. Relying on *Itasca Paper Co v Ins Co* (Minn 1928) 220 NW 425, the court said that the referees could not determine “the ultimate question of liability”, and that their decision “on a question of law would not be final”.

The *Itasca* case is an interesting one. A fire policy covered on “pulpwood”. After a fire, the assured demanded a reference. The insurer refused to appoint a referee, claiming that the property burned was not pulpwood but “wood pulp” and not covered by the policy. The assured had the court appoint an umpire, and the two referees proceeded to bring in an award for the value of the burned property as “pulpwood”. The assured then filed this suit to recover the amount of the award. The insurer defended on the ground that the property was not pulpwood but wood pulp; the assured argued that this point was settled by the award and so not open to proof on the trial. Judgment of the trial court to that effect was reversed on appeal.

The decision is sound. Determination of whether the property burned was pulpwood or wood pulp was strictly a *fact* question; and the determination of it was not necessary to the question submitted—the *value* of the property burned. Moreover, whether necessary or not, and whether a fact question or a law question, an error by the referees *as to the entire claim* would be such a gross error that any court would permit it to be shown, and if shown would vacate the award. The court said that the reference was “in the nature of a common law arbitration”;²⁹ and so the case cannot be authority for limited powers of appraisers as

²⁹This, of course, is directly opposed to appellant’s position in the case at bar that an insurance policy reference is not an arbitration but merely an appraisal. We shall discuss this matter more fully in a later part of this brief directed to that point. (See: Argument, V, D.)

opposed to arbitrators. After pointing out that insurance policy referees cannot "determine the general question of liability"—a truism—the court said:

"But questions of law or fact which are involved as mere *incidents* to a determination of the amount of loss or damage, do not go to the root of the action, and . . . (are) a part of a reasonable method of estimating and ascertaining the amount of the loss . . . The findings of the board are conclusive, in so far as their determination is necessary and an element or step in arriving at the amount of loss and damage; but though conclusive for such purposes, it does not have such efficacy upon the question of liability, which, when raised, must be decided by the court."

The decision, although it has been criticized,³⁰ seems to us to have been correct, at least on the facts before the court. In any event, it is difficult to see how appellant can derive much satisfaction from the *Ciresi* and *Itasca* cases. Both of them are from Minnesota, and appellant has gone to considerable pains to argue that the Minnesota rule on insurance policy references "is not and never has been the law of California" (pp 34-5).

(5) *Tabor v Craft* (Ala 1928) 116 So 132 is a clear case of referees departing entirely from the limits of the submission agreement, as is apparent from appellant's treatment of the case (pp 46-7). A very recent note in 63 *Harvard Law Rev* 681, at 688, n 60, refers to the *Tabor* case as an example of a

³⁰29 *Columbia Law Rev* 91.

limited type of submission agreement conditioned "that the arbitrators should decide the matter according to a specific standard", and says:

"The courts generally—even in those jurisdictions which otherwise strictly limit review on the merits—are quick to upset an award which does not conform to the stipulation."³¹

C. The merits.

Appellees contended before the referees that the post-fire logging operations benefited appellant by more than the claimed excess cost that appellant sought to charge to appellees under the policies.³² The referees found this contention sound (Ex V):

"... It ... is true, as claimed by the insurers, that, after allowance of a larger excessive logging cost, there was an accumulation of profit in such logs which was realized after the termination of the loss period."

Appellant took the position that its postfire logging operations were performed solely for the benefit of the insurers in order to reduce the loss; but the referees did not have to agree that this was the case.

³¹In a footnote to this statement (n 62), it is said:

"The courts' insistence on adherence to stipulated standards is akin to their reviewing to see whether the arbitrator decided issues which were not submitted."

³²Adjusters' letter to referees of 4 April 1947 (Ex 4):

"It is . . . our contention that the assured rather than the (insurers), will benefit from the use of the logs held in the first fiscal year after operations (are) resumed. They will have 15 million feet more than normal production and the production of logs was never able to equal the capacity of the sawmill to make lumber or the box factory to remanufacture lumber into shook."

The referees were right, but whether right or wrong, the question was strictly a factual one that was for the referees to determine.

They also had to decide other factual questions. Was the amount claimed by appellant as to these three items reasonably accurate? Or was it excessive as to all or any? And if excessive, by how much? What amount would properly compensate appellant with respect to these items?

All of these problems the referees wrestled with at length. All of them involved factual and not legal questions. All of them the referees finally resolved to the best of their ability, after weighing all the evidence, and by an exercise of their best judgment. They determined to allow \$25,000 to cover them all, and they did so.

What, then, is left for appellant to complain of?

First, that the referees did not allow an adequate amount. We have already seen that such an argument is not seriously urged; nor is it tenable, in the light of the tentative nature of the claimed amounts and appellant's own admissions of possible excessiveness.

Second, that the referees treated the three items as a unit and arrived at a single sum to be allowed for all, rather than a separate sum for each. But what if they did? Were the referees bound to make a specific finding on each of the hundreds of items listed in appellant's proof of loss? And if not, why

on each of *these* three items? By what rule of law were they bound to make any findings at all? Decisions, yes; findings, no. Appellant got a decision from the referees on its claim—on all of it. More than this, appellant was not entitled to and had no right to expect.

Sapp v Barenfeld (Cal 1949) 34 AC 582, 599,
212 P2 233, 239:

“The failure to make an express finding in the award on that claim does not invalidate the award. ‘There is no general rule that arbitrators must find facts and give reasons for their awards. In fact, the rule and general practice is to the contrary.’ . . . The award is valid if it serves to settle the entire controversy. A decision simply that one of the parties should pay the other a sum of money is sufficiently determinative of all items embraced in the submission.”

Lundblade v Ins Co (DC Cal, 1947) 74 FS 795,
797:

“It is not necessary that findings be prepared by the appraisers.”

Brown v Bellows (1826) 4 Pick (21 Mass) 178,
at 190.

Cramer & Co v Washburn-Wilson Seed Co
(Ida 1948) 195 P2 346, 350.

Third (and last), that the decision on these items was a “compromise”, and as such must be held to have invalidated the entire award. The common sense of the matter is that there would be few valid refer-

ence awards if courts upheld any such rule as that contended for by appellant. That they do not, is clear from the authorities.

Duke of Buccleuch v Metropolitan Board (HL 1872) 41 LJRN (Exch) 137, 3 Eng Rul Cas 455, 488:³³

“Although they (the referees) had agreed as to the result and amount of the award it would not at all follow that they agreed in the steps by which it was arrived at. Indeed, we know that agreement in such a result is often only arrived at by some concession and compromise . . .”

6 CJS 191; Arbitration, § 50:

“... They (the referees) may each defer to the opinion of the others, basing their award upon a compromise of opinion.”

Morse, Arbitration & Award, 164-5:

“Unanimity in each incidental question is unnecessary . . . If they all hear the cause and finally concur in the award, it is sufficient.

An obvious and inevitable necessity has also led to the rule that if each arbitrator exercises his own independent judgment upon the matter submitted, it is no objection to the award that one gives way to the other; since in case of any difference of opinion arising an agreement and determination could be reached in no other way . . .

³³This is the case that states “The true rule” as to compromises by appraisers, according to *St. Paul F&M Ins Co v Eldracher* (CCA 8, 1929) 33 F2 675. The *Eldracher* case, it will be remembered, is the principal authority on which appellant relies (p 42) to invalidate the “compromise”.

A kindred doctrine is, that the process by which arbitrators come to an agreement is of no consequence, and cannot be inquired into by the court, neither be made a basis to vacate their awards. Thus where several different questions are contained within the submission, though the arbitrators differ as to some of them, yet if, by different courses, they all come to an agreement on the sum total, the award shall stand.”

Janet Shops v Tweens Inc (1948) 82 NYS2 185.

III. BOX FACTORY PROFIT (Specification III).

A. Appellant's "facts".

Appellant confidently and repeatedly asserts that its "actual cost" for the lumber used in the box factory was \$39.86 per M (pp 47, 48, 49).

This is about as accurate as to say that the "actual" weight of each member of your family is exactly 123 pounds, because if you add together the weights of all and divide by the number of people involved the answer is 123. Similarly, appellant's figure represents an arithmetically computed *average* cost obtained by dividing total cost figures by the total number of feet of all grades produced.

As a matter of fact, there is no such thing as an "actual" cost for one of several different grades or kinds of product produced by a joint manufacturing process. All methods of cost accounting involve assumptions, the sanctions for which rest in accounting

judgment and business practice. As Mr. Momyer, appellant's treasurer, testified (R 262):

"Q. Now it is a fact, is it not, . . . that the question of determination of cost for the product which comes through a joint process is a very difficult one as to which all accountants are not in agreement? A. Well, I think that that is true . . ."

Appellant insists (p 58) that, since all of the shook produced in the box factory was in fact sold, "actual realizations were determined . . . and therefore . . . there is no excuse for theorizing . . ." ³⁴ Nevertheless, appellant finds it necessary to indulge in some very broad assumptions in order to arrive at a profit for the box factory operations. The first assumption is that "average" cost is "actual" cost. And this in turn involves the equally unrealistic assumption, inherent in the use of an "average" cost, that every foot of lumber produced should be charged with the same unit cost of production regardless of whether it is a foot of top grade lumber selling for over \$100 per thousand feet or is the lowest grade of firewood worth only a small fraction of that figure.

As the evidence at the trial showed without contradiction, the proper and usual method of costing joint products such as lumber is by means of an *allocated cost*, which distributes the common costs of

³⁴It is, of course, absurd to say that because all of the shook was sold and the gross realization known, the profit or loss of the operation can be determined without postulating a basis for costing the box lumber into the box factory. The basis to be used is obviously to be determined by a choice of cost accounting methods, and can be determined in no other way.

production among the various grades produced in proportion to the respective market values of each grade at the point of diversion.

Without belaboring the point, we will say that appellant's contention that its figure (or any figure) of "average" cost is "actual" cost or is appropriate for use in costing the lumber into the box factory, was completely demolished by its own witness and referee, Mr. Herrick. He pointed out in his letter to appellant's counsel (Ex S) that IF a *cost* figure is to be used in figuring the box factory profit,³⁵ the proper figure—

*"would not be average cost for which you (appellant) argue but allocated cost and upon such basis the lumber used by the box factory in post-fire operations would be computed as costing at least several dollars less than the OPA prices which were adopted."*³⁶

Mr. Herrick's "Memorandum of general considerations" (Ex V) prepared just before the award was signed, and purporting to represent the unanimous views of all three referees, notes that—

"the propriety of using average cost is not argued as that basis has no reasonable support."

³⁵As we shall presently note, Mr. Herrick did not feel that a *cost* figure should be used at all. In this he was undoubtedly correct.

³⁶Mr. Momyer, under questioning by the trial court (R 401), admitted that an allocated cost of the box lumber at the diversion point would be less than the OPA price. It follows, of course, that the use of the OPA base rather than an allocated cost base was beneficial to appellant, because lowering the cost base of the box lumber would increase the profit of the box factory and would therefore decrease the amount of loss payable under the policies. (Opinion, R 109)

And again, Mr. Herrick says (Ex S) that the referees did not use appellant's average cost figure because to have done so would have supported a contention of appellant which—

“is erroneous, without any foundation in accounting, and can be successful only by the application of some principle or claimed principle of law which will be *wholly unrealistic and in disregard of accounting principles.*”

Basically, appellant is complaining because the referees rejected what appellant contended was its “actual cost” of producing the box lumber to the point of diversion “without a penny's profit” (p 47). It is quite true that the referees did not use this or any *cost* figure. The problem before the referees was to allocate or distribute appellant's profit on the sale of box shook as between two consecutive manufacturing operations. Each of these two operations had to be credited with a due portion of the ultimate profit realized on sale of the shook. It is perfectly clear that if one could determine with complete certainty the “actual” cost of the first operation (producing the box lumber from the tree to the point of diversion to the box factory), this would *not* be an appropriate basis to use for costing the lumber into the box factory, because to do so would throw *all* of the profit to the second operation (producing shook from box lumber in the box factory) and *none* of it to the first operation.

By relying on this argument, appellant is in the position of contending that none of the profit made

on the shook should be allocated to the operation prior to the point of diversion. Even appellees do not take such an extreme position, as this would mean that the box lumber would be charged into the box factory operation at a true cost, which would thereby throw all of the profit on both operations to the box factory and hence would further reduce appellant's insurance recovery. Of course, appellant does not really mean to travel down this road at all. Appellant urged upon the referees a "cost" at the point of diversion *that was no cost at all but actually had in it a greater portion of the ultimate profit than the figure used by the referees.*³⁷

Appellant says that the referees used OPA prices for the box lumber because they thought that "the law required" them to do so (pp 51, 56); and appellant quarrels with the trial court's finding³⁸ to the contrary (p 52), saying that there is "no evidentiary support" for it. Here, for obvious reasons, appellant

³⁷As we have seen, Mr. Herrick made it clear (Ex S) that if *cost* at the point of diversion were to be the test, it would have to be an *allocated* cost and not an *average* cost, for the latter figure would be "wholly unrealistic and in disregard of accounting principles". The OPA figure on which the referees based their decision was substantially higher, and hence more favorable to appellant, than a true cost would have been.

³⁸Opinion, R 109:

"Defendant (appellant) asserts that the referees thought they must accept OPA ceiling prices. There are some statements to this effect in the depositions, but taking all the evidence into account, it is clear that this thought, if in the minds of any or all of the referees, was not the motivating or actuating basis for their decision. They decided as a matter of practical and realistical accounting that the OPA ceiling price was the fairest, most practical and realistic method of costing the lumber into the box factory for the purpose of determining the profit from the box factory operations."

chooses to ignore the evidence produced by appellant in the Herrick deposition. Mr. Herrick makes it abundantly clear that the OPA figures were used, not because the referees were attempting to follow any rule of law, but because as businessmen and accountants they made what in their own judgment was the proper determination. Mr. Herrick said (Ex S) that the referees could not adopt appellant's "average" cost because it was—

“without any foundation *in accounting*, and can be successful only by the application of some . . . claimed *principle of law* which will be *wholly unrealistic and in disregard of accounting principles* . . . It is fundamental that to determine the profit from a supplemental operation the lumber consumed should be charged in at a price equal to that which could have been realized had the supplemental operation not taken place. This is a *general practice* among lumber and box manufacturers, *the Pickering Lumber Corporation (appellant) determined a box factory profit upon that basis*, and I doubt that you could get any accountant to testify to the effect that that was not *the generally accepted basis*.”

In other words, the referees *rejected* supposed principles of law urged upon them by appellant, and made their decision instead on the basis of accounting principles and the general practices of the industry and of appellant itself. Examination of the briefs filed with the referees (Ex 3; Ex 6) will show that it was *appellant* who insisted that the award should be made on the basis of supposed legal authority rather than

by an exercise of accounting and business judgment by the referees. Appellant cited case after case (Ex 6) to the referees who were, after all, not lawyers; and now appellant complains because they followed what appellant says is the wrong rule of law.³⁹ The referees, however, preferred a practical approach to appellant's legalistic one.⁴⁰

B. Appellant's law.

Appellant cites a number of cases (pp 52-56)⁴¹ to the point that OPA ceiling prices are "not controlling"⁴² in determining market value or cash value under an insurance policy covering on physical property. We have no quarrel with this line of cases, but they are inapplicable to the instant situation. The policies in suit covered on use and occupancy, and not on

³⁹Appellant now says (p 39) that the referees were not only unauthorized to pass upon questions of law, "but, being laymen, lacked the special competence to do so".

⁴⁰Compare, the expression in *Fidelity-Phoenix Ins Co v Benedict Coal Corp* (CCA 4, 1933) 64 F2 347, 352, quoted with approval by appellant (p 58), where with reference to the determination of the amount of loss under a use and occupancy policy it was said that "such losses are to be determined in a practical way."

⁴¹*Sun Ins Office v Rupp* (DC Mo, 1946) 64 FS 533;
Tierney v Ins Co (DC Tex, 1945) 60 FS 331; 152 F2 224;
Southern R Co v Farmer (Ga 1946) 39 SE2 714;
Ross Produce Co v Thompson (Ia 1945) 20 NW2 57;
Louisville etc R Co v Blanton (Ky 1947) 200 SW2 133;
Brock v Cato (Ga 1947) 42 SE2 174;
Ablon v Hawker (Tex 1947) 200 SW2 265;
Betts v Hitchcock (Tex 1946) 197 SW2 878;
Zemel v Commercial Warehouses (NJ 1945) 40 A2 642;
Anstine v McWilliams (Wash 1945) 163 P2 816;
Lym v Thompson (Utah 1947) 184 P2 667;
Fugate v State (Okla 1945) 158 P2 177.

⁴²The quoted words are from the *Tierney* case, as quoted by appellant (p 55).

the lumber.⁴³ The problem before the referees was not primarily to establish a market or cash value for the box lumber, but to allocate fairly the profit made on the sale of shook between the two operations of manufacture.

C. The merits.

The referees had to determine a basis for costing the lumber into the box factory that would fairly allocate the profit on the shook as between the operations prior and those subsequent to the point of diversion. The basis which they used was the OPA price for box lumber "sweetened" by a very favorable (to appellant) freight differential (R 427-430). That they reached a proper conclusion is easily shown.

Appellant itself told the referees in the brief it filed with them (Ex 6, pp 42-3) that it was proper accounting practice to charge an intermediate product into a secondary manufacturing operation "on the basis of what it is worth" rather than on the basis of the cost of production to the point of diversion.

⁴³Interestingly, some lumber did burn in this fire, AND APPELLANT PRESENTED ITS CLAIM TO THE INSURERS ON THE BASIS OF OPA CEILING PRICES ON THE BURNED LUMBER (Ex I; Ex J). Momyer testified that appellant used OPA prices to determine the market value or the value in place of the burned lumber "because we had no other basis" (R 230, 233, 240-1). Some of the lumber burned was box lumber (R 237-8). Admittedly, appellant's figure of "average" cost of the lumber was available at that time (R 231), BUT APPELLANT REJECTED THIS FIGURE IN FAVOR OF THE OPA PRICES. Still appellant now complains because the referees did the same thing.

Appellant's "explanation" of this situation (pp 56-7) is unconvincing.

Appellant argued, however, that since box lumber could not generally be bought on the market, the “basis of what it is worth” could not be used; and that the use of *average* cost was “justified because there is *no other rational basis* upon which to make the charge”. No *allocated* cost figures were given to the referees because (according to appellant—Ex 6, p 44) “there is no available data upon which such an allocation can rationally be based”. Appellant further told the referees (Ex 6, p 43):

“Nevertheless, if, by the adoption of average cost, Pickering has denied to the insurance companies a profit which it has actually made, average costs would probably be rejected in favor of some more equitable method if one were available.”

Obviously, the referees concluded that a more equitable method *was* available.

The Pickering audit report for the test year (Ex M, p 16)⁴⁴ showed, and Momyer himself testified at the trial (R 264-6), that when appellant wanted to determine the amount of profit it was making on its box factory operation as compared to its other operations *it costed the box lumber into the box factory at OPA prices*. Mr. Rollin Rodolph, who was called by appellees as an expert witness at the trial (and who was one of the three accountants suggested by Mr. Herrick for the post of umpire—R 552), testified (R

⁴⁴This report was prepared by appellant’s accountants in June 1945 *before* the fire which caused the loss here involved, and covers appellant’s operations for the fiscal year ended 31 March 1945.

444-6) that it was general accounting practice in the lumber industry⁴⁵ after 1942 to cost box lumber into a box factory operation at OPA prices; and that in his opinion this practice was in accord with sound accounting principles and practices, and would give a proper allocation of profit as between a box factory operation on the one hand and the prior manufacture on the other,—something which, as he pointed out, the use of an *average* cost basis would not do.

Although appellant failed to furnish the referees with an accurate allocated cost for the box lumber, the referees were sufficiently experienced to be aware of the fact that the OPA price was high enough to return to appellant a reasonable profit on the sawmill operation over and above an approximated allocated cost. According to Mr. Herrick, an allocated cost for the box lumber was “at least several dollars less than the OPA prices” (Ex S); and Momyer confirmed this (R 401).

The audit report for the test year (Ex M, p 11) showed that the average profit made in that year on lumber sales was \$3.65 per M. Hence the use of OPA prices gave appellant a profit on the sawmill operation substantially the same as or even greater than its average profit made on lumber sold at the point of diversion. This would seem to have been fair to appellant because box lumber is a relatively low-priced

⁴⁵The eminent qualifications of Mr. Rodolph to testify on accounting practices of the lumber industry in general and of box factory operators in particular, are striking. (See, his opening testimony stating his background and qualifications—R 432 ff.)

grade as compared to grades sold after going through the sawmill; to allow as much profit per foot on the box lumber as was realized on the better grades was giving appellant the benefit of the doubt.

It is a matter of common knowledge that when OPA prices were fixed in 1942 a market price base was used which, presumably, was sufficiently high to allow a normal profit on sale. Between that time and the time of the fire the OPA price on box lumber was gradually adjusted upward to take care of the general increase in cost of manufacture due to higher wages and other costs. In about June of 1943 the government, in order to stimulate the production of shook, materially raised the ceiling on shook.⁴⁶ The result of this was that whereas the relationship between the OPA ceiling price on *box lumber* and the cost of manufacture and profit remained more or less *constant* from 1942 to the date of the fire, the relationship between the OPA ceiling price on *box shook* and its cost of manufacture and profit was *distorted* with a considerable stretching or increase of the profit to be made through operation of a box factory. What appellant really wanted the referees to do was to allocate to the *sawmill* operation a substantial portion of the large profit that was to be made by the *box factory*

⁴⁶Appellant proved these facts in the hearing before the referees through the testimony of Mr. Lucas of Robinson, Nowell & Co., appellant's accountants. Lucas testified that between 1942 and 1945 the ceiling price on lumber rose about 12%, *while the price of shook almost doubled*. (See Herrick's notes of the referees' hearings, Ex T.) Mr. Momyer generally confirmed this at the trial (R 386-391).

operation. This, the referees had no right to do; and they properly refused to do it.

The referees made their decision as accountants and businessmen, in the exercise of their best judgment and after a full and fair consideration. They did not, despite appellant's assertions to the contrary, decide as they did because they thought the law required them to do so. Nonetheless, the only court decision we know of on this point directly supports the position they took that *cost* (—even a properly allocated cost) would not be the correct basis to use. We refer to *National Union Fire Ins Co v Anderson-Prichard Oil Corp* (CCA 10, 1944) 141 F2 443, cited by the trial court (Opinion, R 112).⁴⁷ The *Prichard* case, like the instant case, involved the allocation of profit as between two successive manufacturing processes. It appears to have been correctly decided, and should dispose of appellant's contention that "cost" of the intermediate product (box lumber) was the basis that should have been used by the referees.

IV. DEPRECIATION ON THE BURNED SAWMILL (Specification IV).

This alleged "error" is infinitesimal. It is supposed to have reduced appellant's recovery by \$8,001.44 (p 63) out of a total claim of \$742,004.41—an alleged reduction of less than 1.1%.

⁴⁷It was *appellant* who called this case to the attention of the referees (Ex 6, p 15). But appellant makes no mention of the case in its latest brief.

The referees were quite right to include depreciation on the burned sawmill in determining *the insurable values*, on the basis of which the contribution clause (Ex B, § 4; R 33) is applied. The amount of insurance required to be carried by the penalty provisions of the contribution clause is a figure which must be determinable *when the policy is written*.⁴⁸ It is determined by adding together (1) the amount of net profits that would normally be earned in the period of one year, plus (2) the total of fixed charges and expenses for the same period that must necessarily continue during a suspension of business; the percentage figure specified in the contribution clause is then applied to this result, and the answer gives the amount of insurance which, if carried, will satisfy contribution clause requirements.

On the basis of appellant's reasoning,⁴⁹ no depreciation should be counted at all because all the physical property *might* burn up, and if it did no depreciation would continue after the fire. But by the same token, a small key piece of machinery might be the only thing that burned, and then all of the depreciable property would continue to depreciate.

⁴⁸Otherwise, an assured could not protect himself against possible penalty under this clause.

⁴⁹*Fidelity-Phenix Fire Ins Co v Benedict Coal Corp* (CCA 4, 1933) 64 F2 347, cited by appellant (p 60) has nothing to do with the determination of *insurable values*. The case holds only that depreciation on destroyed property "is not to be allowed as a fixed charge"; that is, it cannot be claimed by the assured as part of the Item II loss of fixed charges, because it is not a loss at all, since destroyed property does not continue to depreciate.

Since the policies insure under Item II against the loss of depreciation (as an expense which must necessarily continue) on all the physical property, and since the purpose of the contribution clause is to compel the assured to carry full insurance to the values at risk, it is clearly incorrect to interpret it so that the amount of insurable values will depend upon what part of the property actually burns.

**V. INSURANCE POLICY REFERENCE AS "ARBITRATION"
OR "APPRAISAL" (Specification I).**

A. Appellant's view.

The theme of appellant's argument on this point may be summarized as follows:

(1) The reference proceeding was not an arbitration, but an appraisal (p 32);

(2) Arbitrators have the power to decide questions of law and to construe the contract involved, and their decisions are final even though erroneous (p 33 ff);

(3) Appraisers, however, have no power to interpret the contract or decide questions of law (p 30 ff).

This line of attack on the award and on the judgment must fail under either of the following conditions:

(1) If the referees here, whether technically arbitrators or appraisers, were empowered to determine with finality questions of law that were implicit in

or incidental to their determination of the amount of loss sustained;⁵⁰ *or*

(2) If the referees here were arbitrators, in the technical sense in which appellant uses the term.

We shall point out that not one, but both, of these conditions existed as to this reference and as to these referees.

B. Trial court's view.

The trial court felt that it was unnecessary to pass upon whether this reference proceeding was technically an arbitration or an appraisal:

“ . . . I do not believe it necessary to determine whether the reference was an appraisal or arbitration . . . Under the policies in question, if a reference were required, the referees were of necessity to determine the profits made by the partial resumption of operations and the fixed charges and expenses; if questions of accountancy or of law were implicit in or incidental to such determination it was the clear intent of the provisions for reference in said policies that the referees should make such determinations whether they were appraisers or arbitrators.”⁵¹

“ . . . The very nature of the questions to be submitted to the referees by the terms of the policies indicated that it was contemplated by and the intent of the parties that the referees should

⁵⁰Appellant makes no contention that the referees decided any question of law or made any interpretation of the policy that was not incidental or necessary to loss determination.

⁵¹Opinion, R 106.

pass upon any subject that was implicit in or incidental to such determination, including questions of accountancy or law, whether they be called appraisers or arbitrators. Accordingly, if in determining these questions they were required to construe the policies or settle questions of law they were acting within the scope of the submission.”⁵²

This view commends itself to reason and common sense. It is amply supported by authority.

C. The finality of an award by “appraisers” is not limited to questions of fact.

Appellant makes no attempt to analyze or delineate the technical distinction between appraisers and arbitrators. Appellant says only that appraisers “are mere valuers” (p 34) appointed to “estimate and appraise the amount of loss” (pp 35, 36).

Accepting *arguendo*⁵³ this “definition” as the measure of the distinction, appellees take issue with appellant’s conclusion that there is any rule of law restricting the finality of appraisal awards to fact questions alone.

It is obvious that an agreement that a price, or the amount of a loss, is to be determined by referees (an “appraisal”) may require of necessity that the referees determine one or more questions of *law*—e.g., What is the proper basis for determining value?

⁵²Opinion, R 119.

⁵³The distinction between “arbitration” and “appraisal” is considered hereinafter.

What is the proper measure of depreciation to apply?—and these in turn, may require the referees of necessity to construe the contract between the parties to see if any special rules are provided.

Such a case was *United Fuel Gas Co v Columbian Fuel Corp* (CCA 4, 1948) 165 F2 746. A contract called for the sale of natural gas by defendant to plaintiff, at a price to be fixed by agreement at five year intervals, or by reference if the parties failed to agree.⁵⁴ Until 1945 the parties were able to agree on price, but in that year they resorted to reference as provided in the contract.⁵⁵ It was contended that the award should be vacated because the referees had *misconstrued the contract* as to the basis on which the price was to be fixed. In upholding the award against this attack, the court said (p 751):

⁵⁴The contract provided:

“On November 1, 1940, and every 5 years thereafter the price shall be determined by agreement or arbitration . . . If the parties are unable to agree upon such price, arbitrators shall be selected . . . The decision of the majority of the arbitrators shall be final . . . The arbitrators shall base their decision upon the then reasonable market value of gas in that territory . . .”

⁵⁵Note the similarity of this situation to the fire insurance contract. Nothing was to be determined except price, based upon reasonable market value. The only difference is that the *Columbian* contract called the reference an “arbitration”, while the insurance policy uses the term “appraisal”. (It is clear that the reference was not a statutory arbitration, because the applicable statute of West Virginia was limited to the submission of “existing” controversies.)

Certainly, the distinction which appellant is urging with so much earnestness in the case at bar cannot be a mere matter of terminology. It must rest on something more fundamental than whether the parties decide to *call* their reference an arbitration or an appraisal. The court referred to the reference as an “arbitration”; with which designation we agree. But on the basis of the distinctions urged by appellant here, the *Columbian* reference was an “appraisal” pure and simple.

“There is no allegation of fraud or corruption on the part of the arbitrators . . . It was their duty under the submission to determine reasonable market value within the territory . . . We cannot say that the arbitrators misinterpreted the contract or that they considered improper evidence in making their award. *But, had they done so, this would not vitiate the award . . .*

‘Arbitrators are judges chosen by the parties to decide the matters submitted to them, *finally and without appeal* . . . If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, *either in law or fact*. A contrary course would be a substitution of the judgment of the chancellor in place of judges chosen by the parties, and would make the award the commencement, not the end, of litigation.’⁵⁶

Other authorities (not involving insurance policy references) holding that “appraisers” have authority to decide questions of *law* germane to the *fact* matter covered by the submission, and to decide them *finally*, are:

Mutual Benefit etc Assn v United Casualty Co.

(CCA 1, 1944) 142 F2 390;⁵⁷

Ice Service Co v Phipps Estates (NY 1927)

157 NE 506, 53 ALR 692;

⁵⁶The sub-quote is from *Burchell v Marsh* (1855) 17 How (US) 344, 15 LEd 96, one of the most frequently cited authorities on the finality of arbitration awards and on the meaning of “mistake” as a ground for vacating an award. Appellant cites the *Burchell* case with approval (p 33, n 44).

⁵⁷“ . . . If the parties submit to an arbitrator for a final decision a dispute the settlement of which requires the construction

Cresroad Estates v Tenzer (1949) 87 NYS2 259;

Note, "Judicial Review of Arbitration Awards on the Merits" (February 1950) 63 *Harvard Law Rev* 681, particularly 685-6.

That the same rule is applicable to insurance policy loss references is clear from the authorities.

6 *Appleman, Insurance Law* 397:

"Where the submission of a loss to arbitrators contains no restrictions or conditions, their decision on all necessary questions of law and their findings of fact involved have been held to be final."

Lundblade v Ins Co (DC Cal, 1947) 74 FS 795, 796:

"... The policy⁵⁸ insured plaintiffs against loss from fire ...

Loss occurred through a fire. The parties were unable to agree as to the amount of loss ... The matter was submitted to appraisers and umpire under the terms and conditions of the policy and an award was made by the appraisers ...

of a contract or the determination of some other question of law, his decision is binding notwithstanding that the award may have been based upon an error of law ...

It is not necessary for us now to decide whether the arbitrator made a mistake in the interpretation he put upon the contract. It is enough that under the terms of the submission he necessarily had to interpret the contract in order to decide the dispute referred to him, and that his award, made in good faith, within the scope of his authority, is not open to judicial review."

⁵⁸The policy was the 1909 statutory California standard fire policy,—the identical policy involved in the case at bar (Ex A). The court upheld the award.

... The duty of the appraisers under the terms of the policy was to 'estimate and appraise the loss' . . . The award of the appraisers was required to be coextensive with the duty. *That duty included decision upon both the law and the facts.*"

Doherty v Ins Co (Mass 1916) 112 NE 940, 942:

"The referees were unhampered by any restrictions or conditions and their decisions *on all necessary questions of law*, and their findings of fact involved in the question or controversy submitted, are final."

Kaplan, Commentaries on the Revised Insurance Law of New York, p 418:⁵⁹

" 'The award of an arbitrator cannot be set aside for mere error of judgment as to the *law* or facts of the case submitted to him. If, in making his award, he keeps within his jurisdiction and is not guilty of fraud, corruption or other misconduct affecting his award, then his award is unassailable . . . ' "

⁵⁹This book was published in 1940. The date is significant because it was not until 1941 that the arbitration statutes of New York (*Civil Practice Act*, Article 84) were amended to include valuation references. Up to that time, insurance policy loss references were consistently held to be appraisals and not arbitrations, either common law or statutory. *Petition of American Ins Co* (1924) 203 NYS 206.

Nevertheless, the author, as noted above, applies "arbitration" finality rules to the loss reference proceeding under a fire insurance policy.

Since 1941 it is settled that a fire policy loss reference is a statutory arbitration. *Fitzgerald v Ins Co* (1949) 90 NYS2 430; 91 NYS2 519.

See, also, the cases cited in the opinion of the trial court (R 119):⁶⁰

Patriotic Order v Ins Co (Pa 1931) 157 A 259,
78 ALR 899;

Continental Ins Co v Titcomb (CCA 8, 1925)
7 F2 833;

Chandos v Ins Co (Wis 1893) 54 NW 390, 19
LRA 321.

D. In California an insurance policy reference is an "arbitration".

1. Distinction between "arbitration" and "appraisal".

The early English cases held arbitration agreements void because they "ousted the jurisdiction of the courts". This doctrine was harsh and unpopular.⁶¹ Commencing with *Scott v Avery* (HL 1855) 5 HLC 811, 10 Eng Rep (Reprint) 1121, the courts began to engraft exceptions on the rule of invalidity to the effect that if the reference was not to determine the general question of liability but only to determine amount, value, or the like, it could be made a condition precedent and would then be enforceable. Both

⁶⁰Appellant seeks to distinguish these cases on the ground that they come from jurisdictions holding that an insurance policy reference is "a common law arbitration" (pp 34-36). However, as we shall show, an insurance policy reference is also an "arbitration", both common law and statutory, in California.

⁶¹The rule that arbitration agreements "oust the courts of jurisdiction" and are therefore void has been severely criticized. *United States Asphalt etc Co v Trinidad etc Co*, (DC NY, 1915) 222 F 1006. And the rule has been occasionally repudiated. *Park Construction Co v School District* (Minn 1941) 296 NW 475, 135 ALR 59.

Today, the courts favor arbitration agreements. "It is axiomatic that the law favors arbitration . . ." *Lundblade v Ins Co* (DC Cal, 1947) 74 FS 795, 797.

types of reference were called "arbitrations" indiscriminately,⁶² although later the term "appraisal" began to be applied to the enforceable type. As time went on the courts departed further from the old rule of invalidity by holding that an arbitration agreement, though revocable *before* award, was not revocable *after*; and the award itself was held to be binding.

The popular revolt against the old rule was transferred from the courts to the legislatures, and arbitration statutes were widely passed with intent to legalize and to simplify arbitrations. Interestingly, albeit illogically, the courts clung to the distinction between "arbitration" and "appraisal", and applied it to the statutes. In so doing, the courts overlooked that the distinction had been developed as an artificial device to ease and limit the old rule that arbitrations were void.⁶³

6 *Williston, Contracts* (Rev Ed) p 5379:

"The technical distinction between appraisal and arbitration, between clauses properly enforceable as a condition precedent and those too broad in their nature or too improperly drawn to be enforced thus, though once, as previously explained, having a purpose in affording some relief against the rigor of the old rule, have outlived

⁶²*Hamilton v Home Ins Co* (1890) 137 US 370, 11 SCt 133, 34 LEd 708.

⁶³45 *Harvard Law Rev* 771:

"The original purpose of the distinction was to permit the courts to save a limited class of agreements from the disapproval which precedent bound them to apply generally to arbitrations. Now the distinction, originally liberal in its purpose, is invoked to restrict the beneficial effect of the modern statutes."

their usefulness and should be eliminated from the law, as tending to confusion and being without logical applicability . . .”

That the “distinction” has been overdone is also suggested by *Sturges, Commercial Arbitrations & Awards*, p 22, citing *Bangor Sav Bank v Ins Co* (Me 1892) 26 A 991, 20 LRA 650, 35 AmStRep 341.

2. The California authorities.

The California courts have continued to follow the traditional rule that there is, for certain purposes, a distinction between arbitration and appraisal. The distinction is of long standing. It was plainly delineated in the leading case of *Dore v Southern Pacific Co* (1912) 163 C 182, 124 P 817, 819:

“Submissions to determine values are of two kinds: First, where the valuers are to examine the property and fix the value in accordance with their own opinion or judgment; second, where they are to afford the parties a hearing and an opportunity to offer evidence, and are to adjudge the value upon a consideration of the evidence, as well as their own opinion. In cases of the first class, it is usually held that the agreement is not properly a submission to arbitration, and is not subject to the rules which govern arbitrators, and that notice of the meetings of the valuers is not required. *Church v Seitz*⁶⁴ . . . was a case of this

⁶⁴This is the case, *sub nomine California Annual Conference of M. E. Church v Seitz* (1887), 74 C 287, 15 P 839, upon which appellant relies (p 30) to show that in California an insurance policy reference is a mere appraisal. However, it is clear from the *Dore* case (*supra*) and from the discussion which follows it, that the *Seitz* case is *not* authority on this point.

class, and it may be considered as establishing this doctrine in this state . . .

The agreement for submission in the case at bar was of the second class above mentioned . . . Cases of this class are usually held to be *common law arbitrations* . . .”

It is clear, therefore, that in California it is not true, as appellant contends, that all valuations are *per se* appraisals. They are appraisals only where the referees are empowered to make their decision on a wholly *ex parte* basis; they are arbitrations where the referees must give the parties an opportunity to be heard and to present evidence.

The recent case of *Bewick v Mechem* (1945) 26 C2 92, 156 P2 757, 157 ALR 1277, relied upon by appellant (p 31), is entirely consistent with the *Dore* case, from which it quotes approvingly; indeed, the very passage quoted by appellant (p 31) from the *Bewick* case is actually taken from the *Dore* opinion. The reference proceeding in the *Bewick* case was held to be an appraisal rather than an arbitration because the contract (as interpreted by the court) contemplated a valuation by the referees on the basis of their own knowledge and viewing of the property and without a hearing of the parties. As the court said (p 1284):

“In the present case it is clear that the parties intended . . . an evaluation by appraisers whom

they regarded as experienced and familiar with the conditions in question.”⁶⁵

It is settled in California that the reference provision in a fire policy contemplates a hearing of the parties by the referees.

Stockwell v Ins Co (1933) 134 CA 534, 25 P2 873:

“Any conduct (by fire policy referees) which . . . results in depriving either of the parties of a fair and impartial hearing to their substantial prejudice may be grounds for setting the award aside. While the hearing and the method of adducing evidence is informal, it is *absolutely essential* that the parties should have the opportunity of fairly presenting evidence of their respective claims.”

The insurance policy in the *Stockwell* case was the 1909 California statutory standard form fire policy. It was precisely the same policy as all of the policies in the case at bar (Ex A). The *Stockwell* case has never been overruled or criticized; a hearing by the California Supreme Court was requested but denied.

⁶⁵As was said in 17 *Cal Law Rev* 643, 647, n 26:

“ . . . The distinction between agreements to arbitrate and to appraise has been observed in California, but the determining factor seems to be whether the agreement provided for a hearing or for an independent examination of the subject matter. If the former was the intent, the agreement was regarded as one for arbitration . . . but if the latter was the intent, it was regarded as an agreement for appraisalment . . .”

The *Bewick* opinion cites this law review article.

It is also settled in California that the fire policy reference proceeding is a statutory arbitration under the arbitration provisions of the *Code of Civil Procedure* (Sections 1280-1293), as these provisions have stood since 1927.

Stockwell v Ins Co, supra;

Lundblade v Ins Co (DC Cal, 1947) 74 FS 795.

See, also, *Hyland v Ins Co* (CCA 9, 1937) 91 F2 735.⁶⁶

3. Appellant's authorities.

Appellant relies on *Dworkin v Ins Co* (Mo 1920) 226 SW 846, in support of its argument that the 1909 California legislature used the words "appraisement" and "appraisers" in the standard fire policy to distinguish the policy reference from an "arbitration". The *Dworkin* case, it is true, holds that a fire policy reference is not an arbitration.⁶⁷ But the basis upon which the decision rests makes the result inapplicable in California. The Missouri court held there was no arbitration because—

"... Notice to the parties of a hearing is not provided for, or the taking of testimony . . . The

⁶⁶In the *Hyland* case, this Court of Appeals discussed the reference clause of the California fire policy. Throughout the opinion the Court refers to the reference proceeding as "arbitration" and "this quasi-judicial process of arbitration"; refers to the referees as "arbitrators"; and refers to the board of reference as "this quasi-judicial tribunal".

Compare, appellant's insistence to the contrary (p 33 ff).

⁶⁷The Missouri court was under some pressure to reach this result, because otherwise the entire loss reference provision of the policy would have been unenforceable under the terms of a peculiar state statute invalidating "arbitration" provisions in contracts.

appraisers were free to act on their own opinion, without the help of evidence . . .”

In California, on the contrary, notice and hearing are requisite to a valid fire policy reference; and such reference is, under settled principles of California reference law, an arbitration and not a mere appraisal.

Appellant’s speculative comments (p 30 ff) on the probable intent of the California legislature of forty years ago can be dismissed by pointing out that that intent is no longer speculative, but has long since been judicially determined,—and determined contrary to appellant’s suppositions.

The cases cited by appellant on “appraisal” (p 34, n 45)⁶⁸ are not in point. Appellees have no quarrel with the cases cited (pp 26-27) on the general rules of interpretation applicable to reference agreements with respect to determination of the scope of the submission.⁶⁹

⁶⁸*Zalle v Ins Co* (1869) 44 Mo 530;
Littlehead v Sheppard (Okla 1926) 251 P 60;
Tax Commission v Clark (Ohio 1926) 151 NE 780;
American Fire Ins Co v Bell (Tex 1903) 75 SW 319;
Phoenix Ins Co v Everfresh Food Co (CCA 8, 1923) 294 F 51.

⁶⁹*Continental Ins Co v Garrett* (CCA 6, 1903) 125 F 589;
Marchant v Mead-Morrison Mfg Co (NY 1929) 169 NE 386;
United States v Moorman (1950) 338 US 457, 70 Sct 288, 94 LEd (Adv Op) 227;
Mercantile Trust Co v Hensey (1906) 205 US 298, 27 Sct 535, 51 LEd 811;
Continental Milling etc Co v Doughnut Corp (Md 1946) 48 A2 447;
Fernandez & Hnos v Rickert Rice Mills (CCA 1, 1941) 119 F2 809;
Jacob v Weissner (Pa 1904) 56 A 1065.

The “non-waiver” clause of the policies, upon which appellant relies (p 28) to establish that by it the parties intended “expressly to reserve from any submission to appraisers any power to construe or interpret the policies”, neither has nor was intended to have any such effect. There are many provisions in policies of fire insurance, having nothing to do with the *amount* of loss, violation of which will relieve the insurer of any liability at all. Such, for example, are the provisions against increase of hazard, keeping of prohibited articles, change of title or interest, etc. (Ex A, R 20-21). Even though the insurer believes that a violation of one or more of these provisions has occurred, it is often advisable from the point of view of both parties that the *amount* of loss be determined (by the usual processes of adjustment, mutual agreement, or by reference) promptly after the fire occurs. In view of the many cases which have found a waiver of policy defenses based upon an insurer’s conduct after loss, it is likely that in many cases the insurer would be deterred from proceeding to adjust or determine the amount of the loss *unless* it had assurance that by so doing it would not be held to have waived available defenses. It was for this purpose—beneficial alike to both parties to the policy—that the non-waiver clause was inserted. Its language is clear, and it is only by a unique distortion of simple English that appellant can bend it to the argument made concerning it. The argument, too, is distinctly an afterthought on appellant’s part, because it has not been presented in any form during the progress of this litigation until now. If the purpose of the clause

is as “obvious” as appellant now says (p 28), it is strange that appellant did not discover it sooner and point it out to the trial court.

There is nothing in the case of *Stockton etc Works v Ins Co* (1893) 98 C 557, 33 P 633, cited by appellant (p 28) which lends the remotest support to appellant’s argument.

6 *Appleman, Insurance Law* 393-4:

“A valid award has been held to be conclusive on the parties, insofar as the amount of the loss is concerned. . . . And although the policy provisions may reserve the question of the insurer’s liability, they do not affect the conclusiveness of the finding as to the amount of loss.”

Appellant (pp. 16, 29) refers to and quotes from a brief or memorandum (Ex 3) filed by appellees’ adjusters with the referees, in which the adjusters said that the reference was not an arbitration, and suggested that the referees should ignore a prior brief filed by appellant (Ex 6) because the referees were “not authorized to interpret . . . or to deal with the legalities” of the policies.⁷⁰ Appellant, however, never

⁷⁰Appellant’s brief to the referees (Ex 6) is almost entirely concerned with legal rules of contract construction and other rules of law, which appellant pressed upon the referees as the proper guides to apply in arriving at their award. It is difficult to reconcile this brief (Ex 6) with appellant’s present position that the referees had no right to interpret the policies or decide questions of law.

We respectfully request the Court to examine this brief (Ex 6). After doing so, it will be apparent that *both* parties to this litigation have changed their views with regard to the scope of the reference and the powers of the referees,—and not merely appellees, as appellant intimates.

saw fit to withdraw its brief or otherwise to indicate acquiescence in the stand taken by the adjusters. Indeed, in the answer of appellant it is alleged (Counterclaim, Count I, par. X; R 60):

“The *only agreement* that defendant (appellant) ever made with any of the plaintiffs (appellees) concerning an ascertainment of the amount of the loss . . . was made by accepting the policies of insurance issued by the plaintiffs to the defendant . . .”

This (and similar statements in appellant’s latest brief, pp. 26, 29) is inconsistent with any contention that the parties, by conduct or otherwise, agreed expressly or inferentially that the reference was to be a mere “appraisal” rather than an “arbitration”. Note also appellant’s *demand* made at the outset of the reference that the referees give appellant “full opportunity to be heard and to present all evidence on its behalf” (Ex N, R 290-1).

The only pertinent inquiry at this time with regard to whether the reference was an arbitration or an appraisal is: What is the appropriate characterization of an insurance policy reference under the law applicable in this jurisdiction?

VI. FINALITY OF AWARDS.

Every presumption, the courts say, is in favor of the validity of an award. And there is no basis in law for distinguishing between “appraisals” and “arbitra-

tions” with respect to the conclusiveness of an award rendered within the scope of the submission.

Sturges, Commercial Arbitrations & Awards, p. 29:

“It is generally considered that such awards (of insurance appraisers) are conclusive and final . . . unless there is cause to disregard, vacate or modify such an award *under the rules which govern arbitrators’ awards.*”

In New York, where the courts have always held⁷¹ an insurance policy reference to be an “appraisal” and not an “arbitration”, the award is nevertheless held to be “binding and conclusive upon the question of damage, in the absence of fraud”.

Williams v Ins Co. (1922) 194 NYS 798, 800;
Steinberg v Ins Co (1911) 128 NYS 994.

Similarly, in Louisiana:

Dawes v Ins Co (DC La, 1932) 1 FS 603.

An “appraisal” case from this (9th) Circuit is:

Polley’s Lumber Co v US (CCA 9, 1940) 115 F2 751.

Palmer v Clark (1871) 106 Mass 373, 389:

“In one important respect it (an appraisal award) is to be *treated precisely like an award under a submission to arbitration.* It cannot be impeached for mistake arising from error in the judgment of the referee, or in drawing conclusions from evidence and observation.”

⁷¹That is, until 1941 when the New York arbitration statutes were amended. (See, Footnote 58, *supra*.)

Dore v Southern Pacific Co (1912) 163 C 182,
124 P 817, 819:

“The . . . cases hold that, in the absence of fraud, the decision of persons appointed as mere appraisers or valuers, although not properly or technically an arbitration and award is binding on the parties. It cannot be disputed that, where an award as to values is to be made after a hearing and upon a judicial investigation and consideration of evidence, . . . such award, if regularly made, is final and conclusive upon the parties with respect to the matter submitted.”

See, also:

Foster v Carr (1901) 135 C 83, 67 P 43;

Re Waters (CCA 5, 1937) 93 F2 196, 114 ALR
1368;

Sebree v Board (Ill 1912) 98 NE 931;

Ice Service Co v Phipps Estates (NY 1927) 157
NE 506, 53 ALR 692;

Annotation: 157 ALR 1286, 1290.

Insurance texts make no distinction as to whether an insurance policy award is technically an arbitration or an appraisalment in considering its binding effect.

6 *Appleman, Insurance Law*, pp 377, 379-380,
389;

45 *CJS* 1367, 1370; Insurance, ss 1126, 1127;

29 *AmJur* 935; Insurance, s 1251;

7 *Cooley's Briefs on Insurance* (2d Ed) 6172.

Additional “appraisal” cases, where the courts applied the finality rules applicable to arbitration awards, are:

California Sugar etc Agency v Penoyar (1914)
167 C 274, 139 P 671;
Goddard v King (Minn 1889) 41 NW 659;
Hegerberg v New England Fish Co (Wash
1941) 110 P2 182;
Luedinghaus Lumber Co v Luedinghaus (CCA
9, 1924) 299 F 111;
Strome v Ins. Co (1897) 47 NYS 481;
Fireman's Fund Ins Co v. Flint Hosiery Mills
(CCA, 4, 1935) 74 F2 533, 104 ALR 556.⁷²

An award will be set aside for inadequacy or excessiveness only if the discrepancy is so gross that fraud or bias is imputable to the referees. Mistake, whether of fact or law, is not a ground for successful attack. The occasional remark in an opinion or text that "mistake" will justify vacating the award must be understood to refer to something more than an error of judgment. A court of law or of equity will not substitute its judgment for that of the referees, just because the court feels that a different result should have been reached. A "mistake" that will justify setting the award aside must be so gross or glaring as to shock the conscience of the court and as to imply a fraudulent, biased, or inane approach by the referees.

The general tenor of authority is tersely stated in *Lundblade v Ins Co* (DC Cal, 1947) 74 FS 795, a case involving an attack on an award rendered (as in the

⁷²This line of citation might be extended almost endlessly, since it would include almost all insurance reference cases, where the award was upheld by the court as well as where it was set aside. In such cases the courts have generally applied "arbitration" finality rules.

case at bar) under the 1909 California statutory fire policy:

“ ‘A mistake which will justify a rejection of an arbiter’s decision is not a mere error in judgment, but on the contrary, it must amount to actual or constructive fraud.’ ”

... ‘Arbitrators are not bound to award on principles of dry law, but may decide on the principles of equity and good conscience, and make their award *ex aequo et bono*.’ ”

VII. IMPEACHMENT OF AWARD BY REFEREE.

Without the testimony taken from the referees by appellant on deposition (all of which was admitted at the trial over appellees’ objection as to competency and relevancy⁷³) appellant would have had no case at all. This is not to say that any of the referees recanted his approval of the award—rather to the contrary. But, by questioning them as to the manner in which and the details of which they calculated and arrived at their award, appellant developed its specific contentions of error.

Such a mode of impeaching a reference award is not permissible. The testimony was not admissible and should have been excluded.

⁷³Appellees objected to the bulk of the testimony taken from the referees during the taking of the depositions and moved the trial court for an order terminating or limiting the scope of the examination of the referees (R 478-486), but the order was refused. When the depositions were admitted in evidence by stipulation, appellees reserved their objections to the competency, relevancy, and admissibility of this testimony (R. 298).

Sturges, Commercial Arbitrations & Awards,
pp 781, 786:

“There is uniform approval of the general proposition . . . that arbitrators shall not be heard to impeach their own award over the objection of the party who would sustain it . . .”

Continental Milling etc Co v Doughnut Corp
(Md 1946) 48 A2 447, 451:

“ . . . The courts recognize that arbitrators may frame one part of their award with a view to the other, and each part may be varied by the view which they take of the whole. It is accordingly held that evidence is not admissible to show in what manner the arbitrators reached their conclusion or to explain the items making up the amount awarded.”

Sapp v Barenfeld (Cal 1949) 34 AC 582, 212
P2 233, 239;

Shirley Silk Co v American Silk Mills (1939)
13 NYS2 309;

Patriotic Order v Ins Co (Pa 1931) 157 A 259,
78 ALR 899, 902-3;

Duke of Buccleuch v Metropolitan Board (HL
1872) 41 LJRNS (Exch) 137, 3 Eng Rul
Cas 455, 495-6;

Eberhardt v Ins Co (Ga 1913) 80 SE 856;

Johns v Ins Co (Ga 1934) 174 SE 215;

White Star Mining Co v Hultberg (Ill 1906)
77 NE 327;

Williams v Ins Co (1922) 194 NYS 798;

In re Home Ins Co (1925) 212 NYS 567;

Redman, Law of Arbitrations & Awards (5th Ed 1932), pp 76-77;
3 *AmJur* 991; Arbitration & Award, s 178.

CONCLUSION.

Appellant ends its brief (p 65) with the usual plea of a disgruntled insurance claimant, that it "bought and paid" for the insurance and therefore should be "entitled to collect it" in full.

The amount of appellant's loss has been determined by a fair and highly competent board of reference, after a full hearing at which (so far as we know and as appears from the record of this trial) all possible evidence and arguments on both sides were presented. The award rendered unanimously by the referees has been upheld by the trial court, after a fair trial as to which no complaint is made that any evidence offered by appellant was excluded, and after a thorough and painstaking consideration of the issues by the District Judge as is evident from his opinion.

The judgment should be affirmed.

Dated, San Francisco, California,
June 23, 1950.

Respectfully submitted,
BERT W. LEVIT,
LONG & LEVIT,
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In the
United States Court of Appeals
For the Ninth Circuit.

PICKERING LUMBER CORPORATION, a Corporation, *Appellant*,

vs.

THE AMERICAN INSURANCE COMPANY, ET AL., *Appellees*.

APPELLANT'S REPLY BRIEF.

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In the
United States Court of Appeals

For the Ninth Circuit.

No. 12491.

PICKERING LUMBER CORPORATION, a Corporation, *Appellant*,

vs.

THE AMERICAN INSURANCE COMPANY, ET AL., *Appellees*.

APPELLANT'S REPLY BRIEF.

We have considered the "Brief for Appellees" and are of the opinion it does not present anything new, nor any answer to "Appellant's Brief," and, inasmuch as we believe that brief honestly and fully presents the facts, and applies the applicable law, no extended reply to the "Brief for Appellees" is indicated or necessary.

We do, however, want to refer, very briefly, to five matters:

I.

As to the numerous cases cited and quoted from by us in Point I of the Argument, on pages 26 and 27 of "Appellant's Brief" (*Continental Ins. Co. v. Garrett*, 125 F. 589, 590, 6th Cir.; *Marchant v. Mead-Morrison Mfg. Co.*, 252 N. Y. 284, 169 N. E. 386, 391; *U. S. v. Moorman*, 338 U. S. 457, 462, 70 S. Ct. 288; *Mercantile Trust Co. v. Hensey*, 205 U. S. 298, 309, 27 S. Ct. 535; *Continental Milling & Feed Co. v. Doughnut Corp. of America*, 186 Md. 669, 48 A. (2d) 447, 450; *Fernandez & Hnos v. Rickert*

Rice Mills, 119 F. (2d) 809, 815, 1st Cir.; and *Jacob v. Weisser*, 207 Pa. 484, 56 A. 1065, 1067), holding that the agreement of submission is "at once the source and limit of their (the appraisers) authority," and that "no one is under duty to resort to these conventional tribunals * * * except to the extent he has signified his willingness," and that the agreement of submission "will be carefully construed in order not to force a party to submit to arbitration a question which he did not intend to be submitted," and that the terms of the submission "must not be strained to discover power to pass upon matters in dispute, but the terms must be clear and unmistakable to oust the jurisdiction of the court, for trial by jury cannot be taken away in any case merely by implication," and that such powers must "be made manifest by plain language" in the instrument of submission, and that such powers are "not to be implied," appellees simply say they "have no quarrel with" them. All they say upon this vital point and these determinative cases is "appellees have no quarrel with the cases cited (pp. 26-27) on the general rules of interpretation applicable to reference agreements with respect to determination of the scope of the submission" (p. 56).

Though appellees say they "have no quarrel with these cases," they seek, throughout their brief, to avoid the effect of them and the fundamental principles they announce and stand for. Those cases state the universal law and are decisive of the vital question in this case, and cannot be evaded or brushed aside by the mere statement that "appellees have no quarrel with these cases."

Admittedly, there is no language in the appraisal provisions of the policies that purports to authorize the appraisers to determine questions of law with finality, and the "nonwaiver by appraisal or examination" provision of the policies, shown at R. 27, expressly prohibits their doing so, yet the trial court expressly found that the appraisers did construe the policies and determine questions of law, and, being of the opinion that such, though not expressly authorized, "was implicit in or incidental to"

he appraisal of the amount of loss, *implied* the power in the appraisers "to construe the policies and settle questions of law"—the very thing that the cases cited by us say cannot be done.

If appellees had an answer to this fundamental point it must be assumed they would have stated it. They have not in any way answered it. They have avoided it.

II.

Appellees admit, on page 58 of their brief, as, indeed, they must, that by the Withers and Ball memorandum to the appraisers (Deft's. Ex. 3) they stated their interpretation of the appraisal provisions of the policies to be, and advised the appraisers, that the procedure was "not a legal procedure nor arbitration," but that "the appraisers are authorized only to determine the amount of loss sustained and the value of the subject of insurance without reference to the question of liability or extent of liability for such items of loss" and that "they are not authorized to interpret contract or to deal with the legalities of the contract" and that "should there be questions involved as to coverage, extent of liability, or the applications of the terms of the contract, the award should be in such form and detail that either interpretation of the coverage or liability could be applied." The appellees point to the fact that appellant filed a memorandum with the appraisers (Plf's. Ex. 6), setting forth legal principles and rules, and appellees say, in footnote 70 on page 58 of their brief, that it is "apparent that *both* parties to this litigation have changed their views with regard to the scope of the reference and the powers of the referees." Certainly appellees have changed their position. They have exactly reversed it. But it is not true to say that appellant has changed its position. Appellant did not in any way challenge, or take exception to, the statement by appellees in the Withers and Ball memorandum to the appraisers that the appraisal was "not a legal procedure nor arbitration" and that the appraisers were "authorized only to determine the amount of loss" and were "not

authorized to interpret the contract or to deal with the legality of the contract," and that should they encounter questions of law their "award should be in such form and detail that either interpretation of the coverage or liability could be applied," but appellant accepted those statements as correct. There was, therefore, complete accord between appellant and appellees, before the appraisers, that this was not an arbitration and that the appraisers were not empowered to pass upon questions of law with finality. And it is only after the appraisers' report, and the finding by the trial court that the appraisers did pass on questions of law, that appellees have reversed their position.

Appellant filed its memorandum to the appraisers upon the authority of *Ciresi v. Globe & Rutgers Fire Ins. Co.*, 187 Minn. 145, 244 N. W. 688, 690, wherein, concerning an appraisal pursuant to provisions of a fire insurance policy, the court said:

"It was not for the appraisers to determine one way or the other the ultimate question of liability. *Although they might consider it as a preliminary matter*, their findings on a question of coverage which would be a decision on a question of law, would not be final." (Italics supplied.)

Appellant hoped to point out to the appraisers the source and nature of legal questions that might arise, which they would have no authority nor power finally to resolve, but with respect to which it would be necessary, as pointed out in the Withers and Ball memorandum, to make their computations in such form and detail that either construction of the law might be applied by others, and hoped to persuade the appraisers to take a preliminary view of the breadth of the coverage which would avoid the necessity of any action to contest the award. Certainly this did not indicate that the appellant considered the proceeding to be an arbitration or that the appraisers were empowered to pass upon questions of law with finality.

Appellees' concession that they have changed and reversed their position shows, at the very least, that there never was any agreement or joint interpretation by the parties before the appraisers that the latter were authorized to decide questions of coverage and of law with finality, and the appraisers were at pains to point out that they understood they were not authorized to do so by saying, in the last paragraph of their report:

"In reaching such findings the appraisers or umpire did not find it necessary to resolve any legal question of coverage or extent of liability" (R. 170).

III.

Appellees concede, at pages 52 and 53 of their brief, that it is held in the California cases of *Church v. Seitz*, 74 Cal. 287, 15 P. 839; *Dore v. Southern Pacific Co.*, 163 Cal. 182, 124 P. 817, 819; and *Bewick v. Mecham*, 26 Cal. (2d) 92, 156 P. (2d) 757, that "submissions to determine values are of two kinds: First, where the valuers are to examine the property and fix the value in accordance with their own opinion or judgment; second, where they are to afford the parties a hearing and opportunity to offer evidence, and are to adjudge the value upon a consideration of the evidence, as well as their own opinion." And that the first class is "not a submission to arbitration."

This means that if the agreement of submission does not, in terms, provide for a hearing upon notice and evidence, then the proceeding "to determine value" is not an arbitration, but is a mere appraisal. The very authority cited and quoted by appellees, in footnote 65, on page 54, of their brief, of *17 California Review*, 643, 647, N. 26, says:

"The distinction between agreements to arbitrate and to appraise has been observed in California, *but the determining factor seems to be whether the agreement provided for a hearing or for an independent examination of the subject-matter. If the former was the intent, the agreement was regarded as one for ar-*

bitration * * *, but if the latter was the intent, it was regarded as an agreement for appraisalment * * *.” (Italics supplied.)

In the California case of *Church v. Seitz*, 74 Cal. 287, 15 P. 839, the Supreme Court of California said (p. 842):

“*They could stipulate for the formalities of an arbitration if they chose to do so.* But in a case like the present, where the reference to a third person is provided for in a contract made long before any controversy arises, which contract is made upon valuable consideration other than the mutual promise to submit to the decision of the third party, the decision being merely one link in the chain of the claim, we think that the proceeding is not an arbitration.” (Italics supplied.)

In the California case of *Dore v. Southern Pacific Co.*, 163 Cal. 182, 124 P. 817, the Supreme Court of California said (p. 819):

“The agreement for submission in the case at bar was of the second class above mentioned. *It expressly provides that the arbitrators should fix a day to begin the taking of testimony and hear the respective parties.* Cases of this class are usually held to be common-law arbitrations and subject to the common-law rules on the subject.” (Italics supplied.)

The last word on the question in California is in the recent case of *Bewick v. Mecham*, 26 Cal. (2d) 92, 156 P. (2d) 757, where the Supreme Court of California, in holding the submission to be an appraisalment, said (p. 760):

“*There is nothing in the agreement to indicate that the arbitrators were to take evidence in a formal proceeding as a basis for their decision rather than their own opinion and judgment.*”

And then the court quotes from the Seitz case, saying that in that class of cases it is usually held “that the agreement is not properly a submission to arbitration.”

To precisely the same effect is the Missouri case of *Dworkin v. Caledonian Ins. Co.*, 285 Mo. 342, 226 S. W. 346, where the Supreme Court of Missouri, in holding that an insurance appraisal was not an arbitration, said (p. 849):

“Neither are the terms of the policy suggestive of a common-law submission. Notice to the parties of a hearing is not provided for, or the taking of testimony, or that the award shall extinguish liability in the policy.” (Italics supplied.)

In the instant proceeding the agreement of submission to the appraisers is constituted solely by the appraisal provisions of the policies *and there is not, nor do appellees contend that there is, any provision or language therein requiring, or even suggesting, that the appraisers must hold hearings or take evidence.* In that situation, as held by the last word of the California Supreme Court on the question, in the Bewick case, the proceeding was not an arbitration, but a mere appraisalment, just as appellees specifically and correctly advised the appraisers in the Withers and Ball memorandum.

In the *Seitz* case the Supreme Court of California, at page 841, observed and approved the holding in *Scott v. Avery*, 5 H. L. Cas. 811, “that a condition in a policy of insurance in a mutual company, that the loss should be ‘ascertained and settled by the committee,’ was not a submission to arbitration.”

Williston on Contracts, Revised Ed., Vol. 6, p. 5376, says:

“The leading examples of appraisal are provisions for determination by third parties of the *amount* of loss in insurance policies.”

Appellees, at pages 54 and 55 of their brief, cite the California District Court of Appeal case of *Stockwell v. Equitable Fire & Marine Ins. Co.*, 134 C. A. 534, 25 P. (2d) 873, and argue that it holds that appraisers of the

amount of loss under policies of insurance in California must hold a hearing, and upon that basis, they argue that the appraisal of the amount of loss under an insurance policy is a common-law arbitration, and even a statutory arbitration under the California Arbitration Statute. As might be expected, when an appraisal, under the terms of an insurance policy, is attacked upon grounds which would also be fatal to an arbitration, the courts have not always been careful to point out the distinction between arbitration and appraisal, because it is immaterial. That case is typical. There the court referred to the appraisal as "an arbitration and appraisal." It could not be both. However, the distinction was immaterial there. Only two attacks were made on the validity of the appraisal, namely (1) though the insured property was completely destroyed and out of sight, no hearing or notice thereof was given, and (2) one of the appraisers wrongfully conducted himself, dominated the appraisal and dictated the figures, and the evidence indicated the result was not in fact agreed to by the other appraiser. The court pointed out that the insured property was so far destroyed that it was not possible for the appraisers to accurately determine the extent of loss without a hearing; and that the misconduct of one of the appraisers rendered their report invalid. Hence the appraisers' report was invalid whether the proceeding was an arbitration or an appraisal.

At all events, as pointed out, the Supreme Court of California has consistently held, from the time of the *Seitz* case, in 1887, to the time of the *Bewick* case, in 1945, that where the instrument under which the valuers are to proceed does not provide that they are to hold hearings, the proceeding is an appraisal and not an arbitration.

Appellees also, at page 55 of their brief, cite the Federal District Court case of *Lundblade v. Continental Ins. Co.*, 74 Fed. Supp. 795 (D. C., N. D. Cal.), in support of their contention that an appraisal under an insurance policy constitutes a statutory arbitration in California. There the policy covered "machinery and equipment *used in sawmill operations.*" An appraisal was had, after which controversy ensued, defendants maintaining that little, if

any, of the property contained in the award was properly sawmill equipment. Plaintiff, on the other hand, contended that it should include not only the equipment set forth in the award, but, in addition, the value of an edger. The court took evidence and *found as a fact* that the policy insured the items included by the appraisers, but *ruled against the plaintiff as to the edger because the court found from the evidence that the plaintiff, both before and at the time of the appraisal, disclaimed any right to recover for the edger and was thereby estopped to complain of the action of the appraisers*. That judgment was obviously right. The finding of estoppel against the plaintiff determined the case. However, Judge Lemmon went further and said (p. 796):

“The award of the appraisers was required to be coextensive with the duty. That duty included decision upon both the law and the facts. Their exclusion of the edger may only be changed if grounds specified in Sections 1287 and 1288 of the California Code of Civil Procedure are shown to exist.”

Being mystified by that statement, and finding no case supporting it, we obtained copies of the pleadings and the briefs of counsel filed in that case, and found that the pleadings did not raise, and the briefs did not present, any issue touching the distinction between appraisal and arbitration, nor cite any cases or law touching the distinction. To demonstrate that this is so, we are printing the pleadings and briefs of counsel in that case as an appendix to this brief, so that Your Honors may conveniently verify our above statements if you so desire.

The true rule is stated by the New York Supreme Court, in the case of *Petition of American Insurance Co.*, 203 N. Y. Supp. 206, 207, as follows:

“The Arbitration Law * * * does not make agreements to determine certain facts by appraisal arbitrations, if they had not such nature anterior to its enactment; and the rule persists that an agreement for the appointment of appraisers under the provision of a policy of insurance to determine the

amount of damages to insured property does not constitute an arbitration.”

IV.

Appellees argue, at pages 63 and 64 of their brief, that the testimony of the appraisers was incompetent. The very cases they cite are to the contrary and establish that the testimony of the appraisers was competent. Here the testimony of the appraisers was not offered or admitted to impeach the award by showing any fraud or misconduct of the appraisers, but was offered and admitted to show what matters were submitted to and considered by the appraisers—to show that, in some instances, they failed to discharge the submission, and, in other instances, they exceeded the submission and undertook to determine policy coverages and other questions of law expressly withheld from them.

Typical of the cases cited by appellees is the recent California Supreme Court, *en banc*, case of *Sapp v. Barenfeld*, 34 A. C. 582, 212 P. (2d) 233, 239. There the court said:

“To prove the arbitrators’ failure to consider the item of damage from the delay in completion, respondents introduced the affidavit of the arbitrator whom they had appointed, Maurice Fleishman. Appellant’s contention that Fleishman’s affidavit was inadmissible as tending to impeach his award cannot be upheld. *Although an arbitrator cannot impeach the award by testifying to his fraud or misconduct, his testimony is admissible to show what matters were admitted for decision and were considered by the arbitrators.*” (Italics supplied.)

The court cites *Giannopolus v. Pappas*, 80 Utah 442, 15 P. (2d) 353, where the Supreme Court of Utah made practically the same statement.

In the case of *St. Paul Fire & Marine Ins. Co. v. Eldracher*, 33 Fed. (2d) 675, 8th Cir., the court treated with this matter fully, and laid down the principles that

establish that the testimony of the appraisers here was clearly admissible. There the court, quoting from *Duke of Buccleuch v. Metropolitan Board*, L. R., 5 Exch. 221, said (p. 678):

“But if the mistake has been as to the extent and nature of the arbitrator’s authority, leading him to exceed it, then, inasmuch as an excess of authority by mistake is just as much an excess as if it had been in consequence of a willful disregard of the limits of the authority the award may be impeached as being made without jurisdiction. Were this otherwise, no one who submits to a reference of one thing could be safe from having an award put upon him as to anything else. Of course, any attempt to annoy an arbitrator by asking questions tending to show that he had mistaken the law (upon matters within his authority), or found a verdict against the weight of the evidence, should be at once checked, for these matters are irrelevant. But when the question is whether he did or did not entertain a case over which he had no jurisdiction, the matter is relevant, and nobody can be better qualified to give testimony on that matter than the umpire.”

The court then quotes, approvingly, from Wigmore on Evidence, saying:

“The scope of the issue submitted to him defines the limit of his authority to award; hence, the award as made may always be invalidated by the circumstance that it exceeds that scope. In a jury trial, this is ascertainable from the pleadings and the judge’s instructions; and the scope of a verdict and a judgment may always be examined in that respect. In an award, the terms of the contract of submission serve in part the corresponding purpose. But, furthermore, since the judge’s and jury’s functions are united in the arbitrator, and since he does not by distinct instructions to himself define the issues which he submits to himself, the ascertainment of the issues which he has actually investigated and decided may have to be made by inquiring of him whether he considered certain issues, in order to learn whether those issues, as considered, are within the scope of his authority.”

The court then quotes, approvingly, from 2 Greenleaf on Evidence (15th Ed.), Sec. 78, as follows:

“And though arbitrators, ordinarily, are not bound to disclose the grounds of their award, yet they may be examined to prove that no evidence was given upon a particular subject; and that certain matters were or were not examined, or acted on by them, or that there is mistake in the award.”

We submit there can be no doubt that testimony of the appraisers here was admissible.

V.

With reference to our contention of legal error on the part of the appraisers in charging the box lumber to the box shook mill at OPA ceiling prices, appellees say, on pages 33 and 34 of their brief, that:

“It is perfectly clear that if one could determine with complete certainty the ‘actual’ cost of the first operation (producing the box lumber from the tree to the point of diversion to the box factory) this would *not* be an appropriate basis to use for costing the lumber into the box factory, because to do so would throw *all* of the profit to the second operation (producing box shook from box lumber in the box factory) and *none* of it to the first operation.”

Then appellees say:

“By relying upon this argument appellant is in the position of contending that none of the profit made on the shook should be allocated to the operation prior to the point of diversion. Even appellees do not take such an extreme position, as this would mean that the box lumber would be charged into the box factory operation *at a true cost*, which would thereby *throw all of the profit* on both operations *to the box factory and hence would further reduce appellant’s insurance recovery.*” (Italics supplied.)

We ask Your Honors to please note that statement with particularity. It accurately states—as we have repeatedly

tried to point out in our brief—our position and the actual facts, as shown by the evidence. Not a penny of the profits made on the box lumber and the shook were, in very truth, “allocated to the operation prior to the point of diversion,” by appellant or by its proof of loss. And this does “mean that the box lumber would be” (and it was) “charged into the box factory operation *at a true cost which would*” (and did) “throw all the profit on both operations to the box factory, and hence would” (and did) “reduce appellant’s insurance recovery,” all as set forth in the proof of loss and as now claimed.

This has been demonstrated, in our brief, but we want to make the matter crystal clear, and now demonstrate it again:

Pickering’s actual cost for the box lumber to the point of diversion to the box factory—without a penny’s profit being allocated to operations prior to that diversion point—and hence its <i>true cost</i> therefor—was	\$39.86 per M
Its cost of manufacturing the lumber into shook was	11.65 ” ”
Its shipping costs were	.97 ” ”
Under-run of 191,670 feet	1.03 ” ”
Its total actual cost was	<u>53.51</u> ” ”
Its total realization was	\$60.22
Its total profit was	6.71
	<u>\$60.22</u>
\$6.71 times 8,828,644 feet (all credited to appellees)=	
\$59,240.93.	

Yet the appraisers, by ignoring Pickering’s actual, or “true,” cost for the box lumber of \$39.86 per M, and by indulging a fictional sale to the box mill, at the diversion point, at the inapplicable OPA price of \$31.55 per M—or at \$8.31 per M less than Pickering’s actual, or “true,” cost for the lumber, to that point—calculated an increase (wholly unreal) in the recovery from the box mill operations from \$6.71 to \$15.02 per M, or by said \$8.31 per M, or ($\$8.31 \times 8,828,644$ feet) \$73,365.93, and thus improperly increased the figure for recovered fixed charges and ex-

penses, by box mill operations, from the \$59,240.93 credited by appellant, to \$132,606.86, to appellant's injury, as a matter of law, in the amount of \$73,365.93.

Conclusion.

In conclusion, we respectfully submit that the judgment of the District Court should be reversed and appellant allowed to proceed to try its case before a jury under Count Two of its Counterclaim.

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San Francisco, California,
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Attorneys for Appellant.

Appendix

In the Superior Court of the State of California
in and for the County of Humbolt

Fred H. Lundblade, E. S. Hansen, and
Charles R. Barnum, Partners doing
business as Salmon Creek Redwood
Co., Plaintiffs,

vs.

No. 21747

Continental Insurance Co., a Corpora-
tion, Defendant.

Filed Oct. 23, 1946. Fred J. Moore, Jr. County Clerk.

By F. M. .akes, Deputy.

Complaint on Fire Insurance Policy.

Plaintiffs complain of the defendant and for cause of
action allege:

1. That plaintiffs were the owners of a sawmill, and
the machinery and equipment therein, near Beatrice, in
the County of Humboldt, State of California, at the time
of its insurance and destruction by fire, as hereinafter
mentioned.

2. That on the 19th day of July, 1945, in consideration
of the sum of \$450.00 to it paid, the defendant executed
to the plaintiffs a policy of insurance on said machinery
and equipment, a copy of which is hereto annexed, marked
"Exhibit A," and by this reference made a part of this
complaint.

3. That on the 2nd day of December, 1945, said sawmill,
machinery and equipment were totally destroyed by fire.

4. That the plaintiff's loss by said destruction of said
machinery and equipment thereby amounted to more than
the amount of said insurance.

5. That immediately following said loss, plaintiffs re-
ported the same, furnished the defendant with proof of
their said loss and interest, and have otherwise duly per-
formed all the conditions of the said policy on their part.

6. That the defendant has not paid said loss, nor any
part thereof.

7. That the plaintiffs are partners doing business under the name and style of SALMON CREEK REDWOOD CO. That prior to the date hereof, plaintiffs filed and published the certificate of doing business under a fictitious name as is required by the provisions of Section No. 2466 of the Civil Code.

8. That the defendant is a corporation of the State of New York.

WHEREFORE, the plaintiffs pray judgment against the defendant in the sum of \$30,000.00, with interest thereon from December 2, 1945, for costs herein, and for such other relief as may be proper.

FRED H. LUNDBLADE

Fred H. Lundblade

HILL & HILL
Attorneys for Plaintiffs.

STATE OF CALIFORNIA, }
COUNTY OF HUMBOLDT. } ss.

FRED H. LUNDBLADE, being duly sworn, deposes and says: That he is one of the plaintiffs named in the foregoing complaint; that he has read the same and knows the contents thereof, and that the same is true of his own knowledge.

FRED H. LUNDBLADE

Subscribed and sworn to before me this
23 day of October, 1946.

ARTHUR W. HILL, JR.

NOTARY PUBLIC in and for the County of
Humboldt, State of California.

(SEAL)

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Attorneys for Defendant.

In the United States District Court,
in and for the Northern District of California,
Northern Division.

Fred H. Lundblade, E. S. Hansen, and
Charles R. Barnum, Partners doing
business as Salmon Creek Redwood
Co., Plaintiffs,

vs.

No.———

Continental Insurance Co., a Corpora-
tion, Defendant.

Answer of Defendant.

Comes now the defendant, Continental Insurance Com-
pany, and, answering the complaint on file herein, admits,
denies and alleges as follows:

I.

Admits the allegations in paragraph 1.

II.

Denies the allegations in paragraph 2, save and except
that it admits that on the 19th day of July, 1945, in con-
sideration of the sum of \$450, defendant issued to plain-
tiffs a "Scheduled Property Floater Policy" of Inland
Marine Insurance in the form attached to said complaint,
in the total amount of \$30,000.00, subject to maximum li-
ability at any single location of not to exceed \$10,000.00;
and defendant alleges that said policy of insurance did
not cover said sawmill, or its machinery or equipment,
but was obtained to and did cover that portion of certain
special machinery and equipment, which was in said mill
temporarily, which would be usual to sawmill operations;
and that said sawmill, together with its machinery and
equipment were separately insured and that the loss and
damage thereto has been paid.

III.

Denies the allegations of paragraph 3, but admits that on or about December 2, 1945, said sawmill, its machinery and equipment, and the machinery and equipment insured by this defendant, together with other equipment, were damaged by fire.

IV.

Denies the allegations of paragraph 4.

V.

Denies the allegations of paragraph 5, but admits that on April 4, 1946, plaintiffs served on defendant purported proofs of loss.

VI.

Admits the allegations of paragraph 6, but alleges that it tendered to plaintiffs the full amount of their loss and damage, as determined by competent and disinterested appraisers, but that plaintiffs refused, and have ever since refused, to accept said payment of said loss.

VII.

Admits the allegations of paragraphs 7 and 8.

For the second and separate defense to said action, defendant alleges:

I.

The policy of insurance issued by defendant provides:

“In case the Assured and this Company shall fail to agree as to the amount of loss or damage, the same shall be ascertained by two competent and disinterested appraisers, the Assured and this Company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately the sound values and damage, and

failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of the loss; the parties thereto shall pay the appraisers respectively selected by them, and shall bear equally the expense of the appraisal and umpire."

II.

That on or about April 9, 1946, defendant demanded an appraisal of the amount of loss; that thereafter plaintiffs and defendant each selected a competent and disinterested appraiser; that said appraisers first selected a competent and disinterested umpire; that said appraisers together then estimated and appraised the damage to machinery and equipment on which loss was claimed by plaintiffs; that said appraisers failed to disagree on any item of loss or damage and did not submit any differences to said umpire; that the estimate and appraisal of the amount of loss and damage to the property claimed by defendants was the sum of \$8235.53.

III.

That of the property submitted to said appraisers, as to which loss and damage was claimed by plaintiffs, the actual loss and damage to "machinery and equipment usual to sawmill operations," as determined by said appraisers, was and is the sum of \$2797.95.

IV.

That on August 9, 1946, defendant issued to plaintiffs its draft No. 32286 for \$100 and its draft No. 32287 for \$2697.95 in full settlement of said claim for loss and damage; that plaintiffs refused to accept said tender; that thereafter defendant, by and through its attorneys, again tendered to plaintiffs the full amount of the loss as determined by the appraisers on property coming within the coverage of the policy.

V.

Defendant hereby tenders to plaintiffs the sum of \$2797.95 and hereby consents to entry of judgment in favor of plaintiffs in said sum of \$2797.95, in full of all claims and demands of plaintiffs against defendant.

For a third, further and separate defense to said action, defendant alleges:

I.

Defendant alleges, and incorporates by reference, all the allegations of the second and separate defense to said action.

II.

That, in and by the purported proofs of loss, plaintiffs claimed loss and damage to "1-stearns 8 x 60 6 saw edger"; that plaintiffs failed to exhibit said edger to said appraisers; that, prior to the appraisal, plaintiffs sold said edger and permitted the same to be removed, thereby preventing an appraisal as to any loss or damage said edger might have sustained; that an edger is not "machinery and" (or) "equipment usual to sawmill operations."

WHEREFORE, having fully answered, defendant prays:

1. That judgment be entered for plaintiffs in the sum of \$2797.95—less defendant's costs of suit, and such attorney's fees and expenses as this court may seem just and reasonable;

2. For such other and further relief as may seem meet and proper in the premises.

H. A. THORNTON

EVANS M. TAYLOR

THORNTON & TAYLOR

Attorneys for Defendant.

In the United States District Court,
in and for the Northern District of California,
Northern Division.

Fred H. Lundblade, E. S. Hansen, and
Charles R. Barnum, Partners doing
business as Salmon Creek Redwood
Co., Plaintiffs,

vs.

No. _____

Continental Insurance Co., a Corpora-
tion, Defendant.

Plaintiff's Memorandum of Points and Authorities.

There are only two issues involved in this matter:

1. Whether certain equipment such as a planer, a sur-
facer, a grinder, tractor parts, dry kiln equipment and
cable were covered under the insuring clause of the con-
tract "machinery and equipment usual to sawmill oper-
ations."

2. Whether the plaintiffs forfeited their right to in-
surance coverage on the Sterns 8x60 six saw edger by
reason of the sale of certain minor parts therefrom by
the plaintiff, Lundblade, on March the 5th, 1946.

I.

With respect to the first issue, it is submitted that the
insuring clause of the contract—"machinery and equip-
ment usual to sawmill operations"—is broader and more
comprehensive than the simple term "sawmill machinery."
The word "equipment" certainly is an addition to the
word "machinery" in the insuring clause and must refer
to pulleys, parts, tools, cables, etc., which complement and
are used in connection with the machinery itself.

The term "sawmill operations" used in the policy
would seem to be broader than the single and customary
term "sawmill," and would connote that everything in-
cidental or necessary to the proper functioning of a saw-
mill was included in the coverage.

It requires no citation of authority to support the prop-
osition that the wording of a contract will be construed

most strongly against the one who prepares it. This is particularly true in the case of insurance contracts.

In addition to the plaintiff, Lundblade, four witnesses were called who testified that all property described in the award of appraisers (Plaintiff's Exhibit 3) was "machinery and equipment usual to sawmill operations." There was not a single exception made by any of these witnesses. Two of these witnesses, Winfield Wrigley and Carl Libbey, have been managers of sawmills comparable in size and output to the mill operated by plaintiffs herein for a period in excess of thirty years, and two of the witnesses, Lee Smith and E. J. Biord, are, and for many years have been, salesmen of sawmill equipment. All of these men have had a wide and long experience in their respective fields and their character, integrity and standing in the community is unquestioned.

Opposed to this testimony was that of the insurance adjuster, Wilfred Ball, the machinery appraisal expert, William Gardner, and Robert S. Glenhill, who is connected with a firm in San Francisco, specializing in hydraulic presses and pumps. Each of these witnesses claimed that certain items in the list of property were more in the nature of planing mill or molding mill equipment than "machinery and equipment usual to sawmill operations." None of these witnesses had had actual sawmill experience, had never operated a sawmill nor been employed by one.

Such authorities as have been found also support the plaintiffs' contentions:

"Machinery" means somewhat more than "machine." It includes whatever is necessary to the working of a machine; as the saw in a sawmill.

Anderson's Law Dictionary, page 643.

Seavey v. Central Ins. Co., 111 Mass. 541.

Pierce v. George, 108 Mass. 78.

State v. Avery, 44 Vt. 629.

Buchanan v. Exchange Fire Ins. Co., 61 N. U. 26, 33.

Bouvier's Law Dictionary, page 742.

Boiler and machinery insurance covers boilers, tanks, pipes, pressure vessels, engines, wheels, electrical machinery or apparatus connected therewith or operating thereby.

Sec. 111, Ins. Code of Calif.

A planing machine in a sawmill has been held to be included in the term "machinery" in a policy of fire insurance.

James River Ins. Co. v. Merritt, 47 Ala. 387.

29 Am. Jur. 222.

Ann. Cas. 1918 # 209, 210.

A windmill and stock scales (which were stored in a granary) were held to be "farming utensils," and within a policy issued to one engaged in general farming. The Court pointed out that the term "utensil" was much broader than the term "tools."

Murphy v. Continental Ins. Co. (Iowa), 157.

Northwestern 855, LRA 1917 B, 934 Note.

LRA 1917 B 937.

The following illustrations were obtained from cases noted in Couch on Insurance, Volume 3, Section 764:

In *Capital Fire Insurance Company v. Carroll* (Okla.), 109 Pac. 535, the insuring clause was "flour mill and such other machinery as is usual to roller mills." Held to cover: machinery used in manufacture of meal, bran and other feed by-products.

In *Seavey v. Central Insurance Company*, 111 Mass. 540, the insuring clause was "engine and machinery for manufacture of tin ware." Held to cover: movable dyes used in giving form to goods manufactured and worked by a press.

In *Phoenix Insurance Company v. Favorite*, 49 Ill. 259, the insuring clause was "articles used in packing meat." Held to cover: Coal in the yard necessary to the operation of the business.

In insurance on a laundry, the term "machinery" was held to embrace the boiler, pipes and fittings used for motive power. 29 Am. Jr. 221.

The contention of the defendant here is similar to that that might be made in the case of a claim under a policy covering "laundry equipment." If defendant's contention here is sustained, they might equally well contend that the mangles and irons for pressing the clothing after it had been laundered were not truly laundry equipment. In the case at bar the surfacer and planer were used for finishing the product, just as the mangles and irons are used for finishing the laundry product.

II.

On March the 5th, 1946, more than three months after the fire, plaintiff, Lundblade, sold some salvage, consisting of handles and levers, from the edger for the sum of \$75.00. The value of the edger immediately preceding the fire, according to the various witnesses, was from \$2500.00 to \$5000.00.

There is no question but that this edger was sawmill equipment. All of plaintiffs' witnesses so testified, and it was not denied by any of defendant's witnesses. Webster's Dictionary defines an edger as "a machine for edging lumber, especially one with feed rolls, press rolls and several circular saws."

The only question here then, is whether plaintiffs forfeited their coverage by the sale of \$75.00 worth of parts on March the 5th from an edger worth immediately before the fire in excess of \$2500.00.

Mr. Lundblade testified that at the time he sold the parts, he believed the matter of adjustment had been completed. The property had been viewed and examined by Bruce Simons, the local adjuster for the insurance company, by Wilford Bell, the special adjuster from San Francisco, and by William Gardner, the machinery appraisal expert, not once, but several times. Until after the date of the sale of the parts, plaintiff had no notice that an appraisal would be demanded by the insurance company, and since the policy limitations (\$10,000.00 for ma-

chinery and equipment at any one location) was wholly inadequate to compensate plaintiffs for their loss, it is only natural that they should attempt to salvage whatever was possible by a sale.

True, Mr. Lundblade did not report the edger in his original letter and proof of loss dated February —, 1946, which he explains by saying that his values on the other equipment so far exceeded the policy limitation mentioned above that he felt it was unnecessary to list all of the equipment. It was not until after the adjusters for the insurance company had indicated that the amounts allowed would be considerably less than he claimed that he included the edger as part of the loss.

The sale of salvage after a fire will not act as a breach of the policy, avoiding liability, where such sale takes place after a reasonable time for the insurer to demand an appraisalment.

29 Am. Jur. 940.

Springfield Fire v. Hayes (Okla.), 156 Pac. 673,
LRA 1917a 1078.

McCullough v. Mill Owners Mutual Fire (Ala.), 8
So. (2d) 404.

In the absence of a policy provision a sale of part of property insured does not avoid policy as to remainder.

20 Am. Jr., Sec. 639, 629.

A change of interest in a subject insured, after the occurrence of an injury which results in a loss, *does not* affect the *right* of the *insured* to *indemnity* for the loss.

Ins. Code, Sec. 301.

14 Cal. Jur. 468.

It is respectfully submitted that judgment should be for the plaintiffs for \$10,100.00—\$10,000 being the maximum coverage at one location and \$100.00 for the water tank at the second location as shown by the appraiser's award (Plaintiffs' Exhibit 3).

HILL & HILL,

Attorneys for Plaintiffs.

In the United States District Court,
in and for the Northern District of California,
Northern Division.

Fred H. Lundblade, E. S. Hansen, and Charles
R. Barnum, Partners doing business as
Salmon Creek Redwood Co., Plaintiffs,

vs.

No. 5721

Continental Insurance Co., a corporation,
Defendant.

Plaintiff's Reply Memorandum of Points and Authorities.

Since we believe the issue is fairly before the Court, and no additional authorities have been found bearing upon the subject, the plaintiffs will submit this matter with a few comments upon the argument and authorities contained in defendant's Memorandum of Points and Authorities.

I.

We cannot agree with defendant's statement throughout the Memorandum that the evidence clearly showed that the items listed were not "machinery usual to sawmill operations." On the contrary, two mill operators of long experience and two sawmill equipment salesmen testified that *all* items were considered by them as "machinery and equipment usual to sawmill operations." These witnesses did not "follow the lead of Winfred Wrigley" as stated by defendant. All of them were mature men, in separate businesses, without connection. Each of them was familiar with the plant which Lundblade operated. Each of them had had *sawmill* experience or sawmill machinery sales experience in excess of **twenty years**.

Defendant argues that the tractor parts and the wire rope or cable was used to "haul logs from the cold deck—in other words, part of the logging operation" (Defts. Memo p. 2, lines 25-27). Getting the logs from the cold deck into the sawmill is part of the sawmill operation, not a logging operation. The logging operation is complete

upon delivery of the logs to the mill, whether they are placed in a cold deck, in a pond or directly upon the landing. Hence, all items of equipment used in obtaining the logs from the cold deck are "machinery and equipment usual to sawmill operations."

We concede that all sawmills do not have the facilities for finishing lumber. That does not make the equipment used in finishing lumber any less a part of a sawmill. Indeed, the authorities quoted by defendant recognized this. The citation from 38 C. J. 146, Sec. 11, says that a sawmill "often includes other woodworking machines such as lathe and planing machines." (See defendant's Memorandum p. 4, ln. 22-24. See also the case of Henry Gossel, 127 Fed. 604, cited defendant's Memorandum p. 4.)

If there was any desire to be technical in the application of the language used in the insuring clause of the contract, it was the defendant's place, since it wrote the agreement, to be very definite and particular in the description of the property it intended to insure. A contract will always be construed most strongly against the one who prepares it, and particularly is this true in the case of insurance contracts. We submit that by common usage, everyday understanding, as well as literally and technically, each and every item listed in the appraiser's report is and should be construed as "equipment and machinery usual to sawmill operations."

It is significant that defendant called not a single sawmill man, not a single sawmill equipment salesman, from this area or elsewhere, but relied entirely upon the testimony of insurance adjusters and a hydraulic pump salesman. Certainly, the understanding of terms of those engaged in the very business is much more important and conclusive than those, who by the very nature of their occupation, are interested in minimizing the amount which an insurance company is required to pay.

II.

The defendant concedes that the edger "was unquestionably sawmill equipment" (Defts. Memo. p. 6); that it had a value of from \$1250 to \$4000. It was included in the formal proof of loss, although it was not mentioned in the preliminary letter which Mr. Lundblade sent to the insurance company.

Defendant asks a number of questions pertaining to their edger, as follows:

Why was it omitted, if it had such value, while items as low as \$64.38 are included? Why was it the only machine which was stripped—if that is true? Why was it stripped, after plaintiff was instructed to preserve the property? Why was it not called to the attention of the adjuster, the machinery expert and the appraiser? (Defts. Memo p. 6).

Defendant then concludes: "Frankly, because this story is absolutely unbelievable."

We submit, there is no other explanation for the matters surrounding this edger. Mr. Lundblade is a man of unquestioned integrity in this community and his testimony in this trial is unimpeached. The edger was not omitted from the proof of loss nor was it omitted from the items the appraisers were requested to appraise. A few parts were sold from it (which defendant labels as "stripped") worth \$75. These were sold only *after* it had been examined by Mr. Simons, the local adjuster for the company, Mr. Ball, the special adjuster from San Francisco and Mr. Gardner, the company's machinery expert. Mr. Lundblade believed, as any normal individual would believe, that the matter had been fully concluded and that he should salvage and save as much of his damage as he could. He had an offer of \$75 for certain parts from the edger which he accepted. Then, and only then, the company asked for an appraisal. There is certainly nothing unbelievable about this story.

Nor did the sale by Lundblade of part of the machinery, after the fire, lessen the carrier's liability, for such act did not vioate any of the policy provisions. Sec. 2032, Ins. Code. Sec. 2032, Ins. Code reads:

After the execution of a contract of fire insurance, an act of the insured does not affect the contract unless the act violated policy provisions, even though such act increases the risk and causes a loss.

Furthermore, the measure of indemnity is the expense to the insured of replacing the thing lost or injured in its condition at the *commencement* of the fire.

14 Cal. Jur. 561.

Ins. Code, Sec. 2051.

Accordingly, it was a commendable act of the insured to salvage what he could and thus reduce the amount of his loss, and lessen the carrier's liability. There was no provision in the policy limiting or forbidding salvaging operations after the fire and the contract of insurance was not affected.

Ins. Code, Sec. 2032.

14 Cal. Jur. 508.

It is nowhere contended, in allegation or proof, that the appraisers did not in fact see the framework of the ruined edger—minus handles and levers. They did learn, however, that those same handles and levers had been sold for \$75. That the value of the remainder of the wrecked edger, plus \$75, the value of the missing parts, would be a fair valuation of the edger in its burned condition. But even that would not be a fair value of the edger *before* it was burned. It could not then be exhibited in its unburned condition. The appraisers could (and possibly did) learn of its unburned value from other sources. Learning that fact and subtracting \$75, they would have the true loss on the edger, and that, we submit, the Court would be justified in finding to be the loss on the edger.

Conclusion.

It appears that the insurance company is attempting to avoid its liability for loss under the terms of the policy here for very technical reasons. Perhaps the policy was

written at too low a rate in the first instance. Perhaps the risk was not a good one. Perhaps the property insured was not described with sufficient clarity.

The reason for the company's refusal to pay is immaterial. The fact remains that it had written the policy, dictating the words, the terms and the conditions. Plaintiff herein has complied substantially with all of those terms and conditions and is entitled to reimbursement for his loss.

Respectfully submitted,

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THORNTON & TAYLOR,
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In the District Court of the United States
in and for the Northern District of California,
Northern Division.

Fred H. Lundblade, et al., Plaintiffs,

vs.

No. 5721

Continental Insurance Co., Defendant.

Defendant's Points and Authorities.

As plaintiff's counsel states there are only two points involved, there being no attack on the appraisal, and it being conceded that the prayer for \$30,000 is in error, as the coverage is limited to \$10,000 at any one location.

I.

Were the items listed below covered under the policy as "machinery and equipment usual to sawmill operations"?

The items which the insurer claims are planing mill, dry kiln or logging equipment are set forth and numbered in the order in which they appear in the schedule attached to the proof of loss. The amount of loss is that determined by the appraisers.

Item	Loss
1 Yates Moulder	900.00
2 Single Side Surfacers.....	750.00
8 Berlin Knife Grinder.....	450.00
9 American Band Rip Saw.....	1100.00
12 Dry Kiln equipment.....	200.00
14 Misc. Cletrac parts	}----- 650.00
15 Radiator Assembly	
16 Differential Assembly	
18 280 Ft. Steel Core Wire Rope.....	123.20
19 222 Ft. " " " "	64.38

The total loss found as to these items amounts to \$4237.58. This, deducted from the total of \$8135.53 found by the appraisers, would leave an insured loss of \$3897.95. We have not deducted the loss found to item 13, the Wisconsin engine, as we concede that the proof shows it could have been used in sawmill operations.

The evidence clearly shows that the Moulder and Surfacers are planing mill equipment; that while the knife grinder would grind "hog" knives, it would be silly to use a grinder capable of handling the long knives used in planing mill equipment to grind the short coarse knives of a "hog"; and that this band rip saw was too light for sawmill work, but was suited to that of a planing mill.

The designation of item 12, "Dry Kiln equipment," definitely shows it was not sawmill equipment, and this is supported by the evidence.

Items 14, 15, 16 are parts of a caterpillar, which plaintiff's evidence shows was used in the yard to haul logs from the cold deck—in other words, part of the logging operation.

Items 18 and 19, wire rope, had been cut into lengths designed to haul and handle logs in the woods or yard.

It was very interesting to note that plaintiff's witnesses followed the lead of Winfield Wrigley, who was the first called after plaintiff. When asked if the items of planing mill equipment were "machinery and equipment usual to sawmill operations," Wrigley hesitated and finally said "Yes, to the operation of a sawmill like that of Mr. Lundblade at Salmon Creek."

In this connection it must be remembered that Mr. Lundblade had just testified that he also operated a planing mill, separated by "a few feet" from the sawmill.

It must also be remembered that it is uncontradicted that there are approximately 250 sawmills in that part of the country, that only 11 of these also operate planing mills, and that these planing mills are separate and detached from the sawmills.

As to the equipment being usual to the operation "of a sawmill like that of Mr. Lundblade at Salmon Creek," it is set forth in the Proof of Loss, and admitted in Court, that the machinery on which loss is claimed was "special machinery and equipment in mill temporarily." It was there for overhaul, repair and resale. The operation at Salmon Creek, where there was a planing mill, is no criterion of "usual" sawmill operation.

Plaintiff's witnesses, naturally, tried to give the impression that a sawmill and a planing mill were merely parts of a whole. They did not, however, disagree with the definitions given by Webster.

Sawmill. "An establishment having power driven machinery for sawing up logs; also a sawing machine used in such a place or for such a purpose."

Planing Mill. "A mill in which material, especially lumber, is planed."

The National Encyclopedia says:

"Lumber Industry. Lumbering or the production of timber products, covers the operations of logging

camp, sawmills, planing mills, veneer mills and cooperage stock mills.

“The principal products of logging camps include saw logs of various lengths, stave, shingle and heading bolts; poles; mine timbers; ship masts; railway ties; fence posts; wheel and handle stocks; excelsior stock and pulpwood. The products of sawmills include rough lumber, shingles, lath, sawed railway ties, and stock for cooperage, spool, pencil, penholder and veneer manufacture. Planing mills produce dressed, that is, smooth lumber; sash doors, blinds, interior woodwork and molding.”

There is no conflict in the testimony that a sawmill produces a finished product; that is, “rough lumber,” which is quoted and sold as such; as a matter of fact this is a matter of such general knowledge that it requires no evidence.

The evidence also shows that the lumber leaves the sawmill at the end of the “green chain” and goes to the yard or dry kiln for drying before going to the planing mill. The reason given for this is that green, wet lumber cannot be properly surfaced or molded.

We have no quarrel with the authorities cited in plaintiff’s memorandum, even that holding that a planing machine is “machinery,” but we cannot see where they are in point.

We cannot, however, follow the argument that irons and mangles are not part of “laundry equipment,” as it is not usual to consider that “rough wash” is the end of a laundering operation.

We do contend that the “sawmill operation” terminates with the turning out of a finished product, namely, lumber. Whatever is done with that product later, whether it is to put it into a building as is, or is dressed or made into sash, doors or flooring, is another “operation.”

There is a great dearth of authority on this subject, but we quote from a Federal decision:

“ ‘Sawmill. A sawmill is an establishment for sawing logs into lumber by power, often including other wood-working machines, such as lath and planing machines, and circular sawmills with their appurtenances, as well as mill chains, dogs and bars.’ 38 C. J. 146, Sec. 11.

* * * * *

“It is not every vocation or occupation in which the saw is used which is for that reason a sawmill. To so conclude might require a latitudinarian construction which would include everything from those monster mills manufacturing into lumber the *Sequoia gigantea* on the Pacific slope to the hut of the peasant of the Black Forest engaged in shaping toys wherewith to delight the immature imaginations of children. A sawmill, as defined by the law of Georgia, is not a planing mill, or a sash and door factory. There are sawmills which have such attachments, but they are not sawmills for that reason, but because they saw logs and timber; as they are cut from the forest, into the lumber of commerce.”

In re Gosel, 127 Fed. 604.

(It should be pointed out that, immediately following the above, the Court quotes from the Standard Dictionary to the effect that planing mill machinery is often found in sawmills. However, there is nothing to show that this is “usual,” or that it is not a separate mill.)

II.

Whether or not plaintiff forfeited any right to recover for the edger.

It will be noted that in the letter of February 6, 1946, plaintiff states:

“We have your letter of Jan. 28th asking that we supply you with a list of items which we claim under our policy as being damaged or destroyed by fire on Dec. 2nd.

“The following is a list of the items which were not in use and were not in any connected with our

mill or planing department * * *. (Italics are ours, as showing that the present claim is an after-thought.)

Then follows a list of items, some priced the same as in the claim, some at approximately twice as much. After setting forth these items, there is added "*and several other items of incidental value.*"

But there is no mention of the edger, which the proof of loss shows as having a "present cash value" and "Amt. claimed" of \$1250.

On at least two occasions Lundblade told the adjuster, at least once in the presence of Gardner, that he was making no claim for the edger. *As a result of his statements, and because this machine appeared to be stripped*, neither the adjuster nor the machinery expert (Gardiner) made any examination of this machine.

On at least two occasions plaintiff was told by the adjuster to comply with the policy conditions and to preserve the property, as it was the only evidence of his claim and as it would be necessary in case of appraisal.

On the trial we find that this edger had a value of from \$2500 to \$4000, although the proof of loss claims only \$1250. We also find that, although at the trial it represented the highest value of any individual item, it was omitted "because the claim was so much in excess of the insurance coverage."

Why was it omitted, if it had such value, while items as low as \$64.38 are included? Why was it the only machine which was stripped—if that is true? Why was it stripped, after plaintiff was instructed to preserve the property? Why was it not called to the attention of the adjuster, the machinery expert, and the appraisers? Frankly, because this story is absolutely unbelievable.

This was unquestionably sawmill equipment. There was no need of trying to build up the claim with planing mill equipment of less value.

Where the insured refused to separate the damaged from the undamaged goods and make a complete in-

ventory, although her attention was called to the policy conditions, but sold the goods the day before making proof of loss, and appraisal was demanded, but failed, insured could not recover.

Siegel v. Millers' Mut. Fire Ins. Co. (C. C. A. 8), 29 F. 2d 988.

“Both insurance companies contend that the sale of the salvaged stock deprived them of their rights under the policy to examine the same and to have an appraisal, and, if they desire, to take it at its appraised value, or to replace the property lost or damaged with other of like character; that therefore the insured has violated the contracts and cannot recover thereon. It is without question that the proofs of loss were not served until February, 1927. The sale of the salvaged merchandise was in the forepart of January. It would seem, therefore, that the provision of the contracts hereinbefore set out was violated, and that the insurance companies were deprived of a substantial right thereunder. If the salvaged property was sold without the consent of the insurance companies, the insured forfeited the right to claim indemnity, and, unless there was a waiver of such provision, the insured cannot recover on these policies. The doctrine is stated in 26 C. J. 366; ‘Under the provision which requires the insured to protect the property and separate the damaged from the undamaged property, etc., the insured cannot recover on the policy, in the absence of waiver, where he sells the property before the insurer has a reasonable opportunity to inspect it or appraise the damage.’ *Astrich v. German-American Ins. Co. of New York* (C. C. A.), 131 F. 13; *Farmer's Merc. Co. v. Ins. Co.*, 161 Iowa 5, 141 N. W. 447; *Lancashire Ins. Co. v. Barnard* (C. C. A.), 111 F. 702; *Hamilton v. Liverpool, etc., Ins. Co.*, 136 U. S. 242, 10 S. Ct. 945, 34 L. Ed. 419; *Thornton v. Security Ins. Co.* (C. C. A.), 117 F. 773; *Oskosh Match Works v. Manchester Fire Assur. Co.*, 92 Wis. 510, 66 N. W. 525.”

New York Und. V. Ins. Co. v. Malham & Co. (C. C. A. 8), 25 F. 2d 415.

(It will be noted that in our case there is no pleading, and of course no proof, of waiver.)

Fuchs v. Sun, 267 N. Y. S. 83.

Johnson v. Hartford, 157 N. Y. S. 893.

The decision of the Supreme Court in *Hamilton v. Liverpool (etc.) (supra)* is short and decidedly to the point. The insured refused to appraise and sold the goods and the judgment in favor of the insurer was affirmed.

In the case of *Oskosh Match Works v. Manchester*, insured sold the salvaged goods and the court held that it constituted a forfeiture.

It is clear that under the contract and the law, plaintiff forfeited any right to recover for loss to the edger, by failure to preserve the same, and by proceeding *the* sell parts, leaving only a stripped frame. This is true, even if one could believe his story as to why this supposedly valuable machine was omitted from the list submitted to the adjuster, why he stated he had no intention of making a claim for it, why he failed to call it to the attention of the adjuster, the expert and the appraisers.

We respectfully submit that judgment should be rendered as prayed by defendant.

September 3, 1947

H. A. THORNTON,

THORNTON & TAYLOR,

Attorneys for Defendant.

No. 12495

United States
Court of Appeals
For the Ninth Circuit.

SAMUEL H. PALMER and C. A. WHITE, Part-
ners Doing Business as WESTERN FENCE &
WIRE WORKS,

Appellants,

vs.

KARL H. KAYE, MATILDA KAYE and PA-
CIFIC WIRE WORKS CO., a Corporation,
Appellees.

Transcript of Record
In Two Volumes
Volume I
(Pages 1 to 322)

Appeal from the United States District Court
Western District of Washington,
Northern Division.

FILED

JUN 16 1950

Philips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

PAUL P. O'BRIEN,

CLERK

No. 12495

**United States
Court of Appeals
For the Ninth Circuit.**

**SAMUEL H. PALMER and C. A. WHITE, Part-
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Appellants,

vs.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States District Court for the Western
District of Washington, Northern Division

Civil Action No. 2106

United States Letters Patent No. 2074665

SAMUEL H. PALMER and C. A. WHITE, Part-
ners, Doing Business as WESTERN FENCE
& WIRE WORKS,

Plaintiffs,

vs.

KARL H. KAYE, MATILDA KAYE and PA-
CIFIC WIRE WORKS CO., a Corporation,
Defendants.

COMPLAINT

Plaintiffs complain of defendants and allege as
follows:

I.

Nature of Action

This action is brought for injunction and damages for infringement of United States Letters Patent No. 2074665, issued March 23, 1937, for woven wire screens.

II.

Plaintiffs

Plaintiffs are citizens of the State of Oregon, residing at Portland, Oregon, and are partners doing business as Western Fence & Wire Works, Portland, Oregon.

III.

Defendants

Defendants Karl H. Kaye and Matilda Kaye are citizens of the State of Washington, residing in Seattle, Washington, within this District and Division. Defendant Pacific Wire Works Co. is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business in Seattle, Washington, within this District and Division.

IV.

Jurisdiction

Jurisdiction is based on the patent laws of the United States of America.

V.

Patent

(a) Heretofore and prior to the 2nd day of August, 1934, plaintiff Samuel H. Palmer, then a citizen of the United States and of the State of Oregon and a resident of Portland, Oregon, was within the meaning and the provisions of the statutes of the United States then in force the first original and sole inventor of a new and useful improvement in woven wire screens.

(b) Said Samuel H. Palmer having duly and in all respects complied with the conditions and requirements of the statutes of the United States of America in such cases made and provided did, on or about August 2, 1934, make application to the

Commissioner of Patents of the United States for letters patent on said invention in accordance with the existing acts of Congress, and by virtue of said application and in compliance in all respects with said laws of the United States, on March 23, 1937, letters patent of the United States, signed, sealed and executed in due form as provided by law, were issued to said Samuel H. Palmer for said invention, and numbered 2074665, which said letters patent are now on record in the Patent Office of the United States, and a true and correct copy of which is attached hereto as Exhibit "A" and made a part hereof.

(c) That in 1944 and prior to April 20, 1948, plaintiffs Samuel H. Palmer and C. A. White formed a partnership under the name and style of Western Fence & Wire Works, to manufacture and sell, among other items, woven wire screens under the patent aforementioned, and as a part of the partnership agreement the said patent was transferred to the partnership. The entire right, title and interest in and to said invention and the letters patent issued thereon has been at all times from the time of said invention vested in plaintiff Samuel H. Palmer or in the partnership composed of plaintiffs Samuel H. Palmer and C. A. White and now is vested in said partnership.

VI.

Infringement

(a) Following application by plaintiff Samuel H. Palmer for letters patent as aforesaid, said

Samuel H. Palmer and thereafter the partnership composed of plaintiffs engaged in the manufacture of woven wire screens in accordance with and embodying the said invention and built up and for many years have maintained a substantial and lucrative business in manufacturing and selling said screens, especially for use in the sand and gravel industry.

(b) Despite the fact that they had previously purchased from plaintiffs woven wire screens manufactured by plaintiffs under plaintiffs' patent hereinbefore set forth and had resold the same, defendants have since 1944 and now continue to manufacture, sell and use or cause the manufacture, sale and use within this District and Division and elsewhere within the United States of woven wire screens made in accordance with and embodying the invention disclosed and claimed in plaintiffs' said letters patent.

(c) The action and conduct of defendants in manufacturing, selling and using, or causing to be manufactured, sold and used, woven wire screens made in accordance with, and embodying the inventions disclosed and claimed in plaintiffs' said letters patent, constitute infringements of said letters patent performed wilfully and without the consent of plaintiffs, all to the great, irreparable damage of plaintiffs. Moreover, defendants threaten to continue to so infringe plaintiffs' said letters patent to the great and irreparable damage of plaintiffs.

VII.

Notice

Plaintiffs on April 20, 1948, notified defendants of said letters patent, and of the fact that defendants were infringing the same, but in spite of said notice said defendants continued and are continuing such infringement.

VIII.

Damage

Plaintiffs have been and are being greatly and irreparably damaged, and defendants have obtained and are obtaining large profits, which, in equity, belong to plaintiffs, the amount of which damages and profits plaintiffs cannot ascertain except by an accounting.

Wherefore, plaintiff prays:

1. For an injunction restraining the defendants and their officers, agents, servants and employees from directly or indirectly making or causing to be made, selling or causing to be sold, or using or causing to be used, any woven wire screens made in accordance with, or embodying the inventions of the said United States Letters Patent No. 2074665, or from infringement upon or violating the said letters patent in any way whatsoever.

2. For an accounting of profits and damages, and that said profits and damages to be paid by defendants to plaintiffs be trebled in view of the

wilful and deliberate nature of the infringement.

3. For plaintiffs' costs in this action to be taxed, and a reasonable attorney's fee.

4. For such other and further relief as the Court may deem just and proper.

/s/ F. A. LeSOURD,

Attorney for Plaintiff.

EXHIBIT "A"

No. 2074665

The United States of America

To All to Whom These Presents Shall Come:

Whereas, Samuel H. Palmer, of Portland, Oregon, Presented to the Commissioner of Patents a Petition Praying for the Grant of Letters Patent for an Alleged New and Useful Improvement in Woven Wire Screens, a Description of Which Invention Is Contained in the Specification of Which a Copy Is Hereunto Annexed* and Made a Part Hereof, and Complied With the Various Requirements of Law in Such Cases Made and Provided, and

Whereas Upon Due Examination Made the Said Claimant Is Adjudged to Be Justly Entitled to a Patent Under the Law.

Now Therefore These Letters Patent Are to

*Identical to Plaintiffs' Exhibit No. 1. See Volume II, page 323 Book of Exhibits—2,074,665.

Grant Unto the Said Samuel H. Palmer, his heirs or assigns for the Term of Seventeen Years from the Date of This Grant the Exclusive Right to Make, Use and Vend the Said Invention Throughout the United States and the Territories Thereof.

[Seal of the United States Patent Office.]

In testimony whereof I have hereunto set my hand and caused the seal of the Patent Office to be affixed at the City of Washington this twenty-third day of March, in the year of our Lord one thousand nine hundred and thirty-seven, and of the Independence of the United States of America the one hundred and sixty-first.

/s/ CONWAY P. COE,

Commissioner of Patents.

Attest:

/s/ H. S. MILLER,

Law Examiner.

[Endorsed]: Filed September 28, 1948.

[Title of District Court and Cause.]

AMENDED ANSWER

Now come the defendants in the above-entitled action and in answer to the complaint of the plaintiffs, allege as follows:

I.

As to the allegations of V (a) the defendants deny each and every one thereof, except that

Samuel H. Palmer was on the 2nd day of August, 1934, a citizen of the United States and of the State of Oregon, and a resident of Portland, Oregon.

As to the allegations of Paragraph V(b), defendants deny each and every allegation therein contained, except that they admit that on August 2nd, 1934, Samuel H. Palmer made application to the Commissioner of Patents of the United States for Letters Patent and that on March 23rd, 1937, Letters Patent of the United States were issued to him, numbered 2074665.

As to the allegations of Paragraph V(c), the defendants have no sufficient information upon which to found a belief as to the truth thereof and they therefore deny each and every allegation therein.

II.

As to the allegations of Paragraph VI(a), the defendants admit that Samuel H. Palmer and the plaintiffs have been engaged in the manufacture of woven wire screens. They have not sufficient information upon which to found a belief as to the truth of the remaining allegations in said paragraph and therefore deny the same.

As to the allegations of Paragraph VI(b), the defendants Karl H. Kaye and Matilda Kaye, admit that they did for a period manufacture and sell woven wire screens but deny that they are doing so now and deny each and every other allegation in said paragraph. The defendant, Pacific Wire Works Company, a corporation, admits that since

January 1st, 1948, it has been manufacturing woven wire screens, but it denies that it did so during any of the remainder of the period alleged and it denies each and every other allegation in said paragraph.

As to the allegations of Paragraph VI(c), the defendants deny each and every one thereof.

III.

As to the allegations of Paragraph VII, the defendant, Pacific Wire Works Company, a corporation, admits that on one occasion the plaintiff, Samuel H. Palmer, orally told Karl H. Kaye, the President of Pacific Wire Works Company, a corporation, that in the judgment of said Palmer said corporation was infringing his patent but said defendant has no sufficient information upon which to found a belief as to whether said notice was given on April 20th, 1948, and, therefore, denies said allegation. The other defendants deny that they, as individuals, were ever given any such notice, and they also deny each and every other allegation in said paragraph.

IV.

As to the allegations of Paragraph VIII, defendants deny each and every one thereof.

For a separate and affirmative defense, the defendants allege as follows:

I.

They deny that the invention alleged by plaintiff, Samuel H. Palmer, in his complaint constituted

any invention or discovery of any new and useful art, machine, manufacture or composition of matter, or any new and useful improvements thereof, or that the plaintiff was the original or first inventor thereof, and aver that the Letters Patent in suit are invalid and void because of lack of invention and lack of novelty, considering the prior state of the art.

II.

Defendants aver that said Samuel H. Palmer was not the original or first inventor or discoverer of any material or substantial part of the thing patented.

III.

Defendants aver that the alleged original invention of the said Samuel H. Palmer referred to in the complaint, had been in public use and on sale in this country for more than two years before his application for a patent and had been abandoned to the public.

IV.

Defendants allege that the names of the patentees, the dates when their patents were granted and the names and residences of the persons alleged to have invented and to have had the prior knowledge of the thing patented are as follows:

Winfield Scott Potter, Pittsburgh, Pennsylvania, Patent No. 1139469, granted May 11, 1951;

James W. Galloway, Hamilton, Ontario, Canada, Patent No. 1907056, granted May 2, 1933. Application filed May 21st, 1932, and in Canada January 22, 1932.

V.

Defendants aver that the alleged patent claimed by Samuel H. Palmer is invalid because of anticipated and prior use and lack of patentable invention; that one J. E. Lippincott designed a similar screen and made prints dated August 31st, 1933, November 28th, 1933, September 29th, 1933, and October 2nd, 1933; that he is an engineer employed by John A. Roebling Sons Company, Trenton, New Jersey, and that John A. Roebling Sons Company manufactured the type of screen covered by his design on or before the dates designated; that the arch deferred to in the claim of the Palmer patent was fully known many years before the alleged Palmer invention and was in no sense new; that it had been known and used or discarded by many manufacturers of woven wire screens long prior to the plaintiff's alleged invention; that among those having knowledge of such arch and having manufactured and sold wire screens involving the alleged invention of the plaintiff in addition to John A. Roebling Sons Company, were:

Manganese Steel Forge Co., a corporation,
Richmond and Castor Streets, Philadelphia,
Pennsylvania;

The Abbey-Sherer Company, and Frank M. Guess, El Monte, California;

Ludlow Saylor Wire Company, Newstead Avenue and Wabash Railroad, St. Louis, Missouri.

Wherefore defendants pray that the above-entitled action be dismissed and that they have judgment against the plaintiffs for their costs and disbursements in this action and for such other and further relief as to the court may seem meet and just.

/s/ FRED M. CATLETT,
CATLETT, HARTMAN,
JARVIS, WILLIAMS,
Attorneys for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed May 4, 1949.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed by and between the plaintiffs herein represented by their attorneys, Little, Leader, LeSourd & Palmer, Seattle, Washington, and the defendants hereby represented by their attorneys, Catlett, Hartman, Jarvis & Williams, Seattle, Washington, as follows:

1. That the question of infringement may be tried out first in this action and the question of

damages, if any, to be awarded in the event that infringement is found may be deferred for later trial before the court or master.

Dated this 15th day of February, 1949.

/s/ F. A. LeSOURD,
Attorney for Plaintiffs.

/s/ FRED M. CATLETT,
Attorney for Defendants.

Upon the foregoing stipulation, it is so ordered.

Done in open court this 16th day of October, 1949.

/s/ JOHN C. BOWEN,
Judge.

[Endorsed]: Filed October 17, 1949.

[Title of District Court and Cause.]

PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having been duly set for trial in the above-entitled court, upon Tuesday, the 18th day of October, 1949, the Honorable John C. Bowen, Judge, presiding, the plaintiff, Samuel H. Palmer, being present in person, and the plaintiffs being represented by their counsel, F. A. LeSourd of Little, Leader, LeSourd & Palmer, and Paul Bliven, and the defendant, Karl H. Kaye, being present in person, and the defendants being represented by their counsel, Fred W. Catlett of Catlett, Hartman,

Jarvis & Williams, and a large amount of evidence, both oral and written and in the form of exhibits, having been presented by both parties, and counsel for both parties having been heard in argument, and the court being fully advised in the premises, now makes the following

Findings of Fact

1.

This action was brought for injunction and damages for infringement of United States Letters Patent No. 2074665, issued March 23, 1937, to the plaintiff, Samuel H. Palmer, for a woven wire screen.

2.

Plaintiffs are citizens of the State of Oregon residing at Portland, Oregon, and are partners doing business as Western Fence and Wire Works, Portland, Oregon.

3.

Defendants Karl H. Kaye and Matilda Kaye are citizens of the State of Washington, residing on Bainbridge Island, Kitsap County, Washington, within this District and Division. Defendant Pacific Wire Works Co., is a corporation organized and existing under the laws of the State of Washington with its principal office and place of business in Seattle, Washington, within this District and Division. Defendants Karl H. Kaye and Matilda Kaye are officers and stockholders of defendant Pacific Wire Works Co.

4.

On or about the 2nd day of August, 1934, plaintiff Palmer made application to the Commissioner of Patents of the United States for Letters patent on an invention of an improvement in woven wire screens and pursuant thereto on March 23, 1937, letters patent of the United States, signed, sealed and executed in due form as provided by law were issued to said Palmer for said invention and numbered 2074665.

5.

In 1944 Plaintiffs formed a partnership under the name and style of Western Fence and Wire Works and said patent was transferred to the partnership. The entire right, title and interest in and to said invention and the rights patent issued thereon has been at all times from the time of said invention vested in the plaintiff Samuel H. Palmer, or in the partnership composed of plaintiffs Samuel H. Palmer and C. A. White and now is vested in said partnership.

6.

Plaintiff Palmer and the partnership composed of the plaintiffs have manufactured and sold screens in accordance with Palmer's invention and have built up a substantial and lucrative business.

7.

In 1944, the business now being conducted by the defendant, Pacific Wire Works Co., a corporation, was being carried on by Pacific Wire Works,

Inc., a corporation; that Pacific Wire Works, Inc., a corporation, was disincorporated December 31, 1944; was the business now being conducted by the defendant, Pacific Wire Works Co. was conducted during the years 1945, 1946 and 1947 by a partnership composed of the defendants, Karl H. Kaye and Matilda Kaye, under the firm name and style of Pacific Wire Works Co.; that on December 31, 1947, that partnership was dissolved, and on January 1, 1948, Pacific Wire Works Co., a corporation, began business.

8.

That the parties hereto prior to trial stipulated that they would first try out the question of infringement and that the question of damages, if any, should be dealt with later.

9.

From 1940 to December, 1944, defendants purchased from plaintiffs and resold screens manufactured by plaintiffs in accordance with the disclosures of the Palmer patent. In December, 1944, defendants stopped such purchases and thereafter supplied their customers with screens manufactured by defendants.

10.

Plaintiffs on April 20, 1948, notified defendants of said letters patent and that defendants were infringing the same.

11.

Plaintiffs' Exhibit 2 is a woven wire screen manufactured and sold by defendants after April 20, 1948, and is a duplicate of a screen manufactured and sold by defendants in December, 1947. It is a screen made for classifying abrasive substances on a revolving, vibrator or shaker machine.

12.

Plaintiffs' Exhibit 2 has a relatively smooth side and a relatively rough side.

13.

Plaintiffs' Exhibit 2 comprises two sets of crossed spring tension high carbon wires, one set being arranged at right angles to the other set.

14.

In Plaintiffs' Exhibit 2 each wire is formed with cold-pressed gradual longitudinal arches, said arches bowing on the smooth side of the screen.

15.

In Plaintiffs' Exhibit 2 the terminals of adjacent arches define relatively shallow crimps on the relatively rough side of the screen, the crimps being coincident with the intersections of adjacent arches.

16.

In Plaintiffs' Exhibit 2 each wire is composed of a plurality of uniformly curved elongated arches and relatively short and gradually formed shallow crimps connecting the arches together.

17.

In Plaintiffs' Exhibit 2 the warp wires and weft wires are of substantially the same gauge.

18.

In Plaintiffs' Exhibit 2 each warp and each weft wire is formed with longitudinal gradual arches bowed on one side of the screen only with adjacent arches defining intersections, shallow crimps on the opposite side of said screen, said shallow crimps being defined by said intersections.

19.

In Plaintiffs' Exhibit 2 the sets of wires are woven with the wires of each set alternately overlying and underlying the wires of the other set.

20.

In Plaintiffs' Exhibit 2 the midpoints of the arches of each set of wires overlie the intersections of the arches in the other set.

21.

In making Plaintiffs' Exhibit 2, defendants straightened the wire after it came from the coil and before it was pressed.

22.

The method employed by defendants in the manufacture of plaintiffs' Exhibit 2 was to cold press high carbon spring steel wires so as to form shallow arches bowing in one direction only and shallow crimps between said arches extending in the op-

posite direction only, then crossing the arched and crimped wires in such manner that the concave side of the crimps of each wire underlie the concave side of the arches of the wires transverse thereto.

23.

When force is exerted by a male portion of a die on one point of a high carbon spring steel wire between two closely spaced points in the female portion of the die, the wire is forced downwardly between the female points and those portions of the wire overhanging the female points are raised upwards and tend to form a U shaped object.

24.

Prior to and subsequent to the Palmer invention, the dies used in making woven wire screens have parts thereof bearing on a plurality of points on each side of the wire. These parts are placed relative to each other and their number and position is varied so as to obtain the shape of the wire which is desired.

25.

Plaintiffs make the arches shown in the Palmer patent by adjusting or forming, for the particular size of wire and screen opening desired, the die parts and the operation thereof so that an arch of the desired and proper length, height and radius will be produced.

26.

Defendants made the arches in the wires of plaintiffs' Exhibit 2 by adjusting and forming the die

parts and the operation thereof to provide the formation of wire found in Exhibit 2.

27.

In the Palmer patent the word "arch" refers to that portion of each wire which is convex toward the smooth side of the screen and the word "crimp" refers to that portion of each wire which is concave toward the smooth side of the screen.

28.

The length and radius of the arch shown in the Palmer patent is determined by the size of the wire and the openings of the screen and is the same for screens of the same size wire and openings.

29.

The formation of the wire as shown in the Palmer patent is characterized by the fact that the adjacent arches on the same wire intersect each other, the crimp being composed of the intersection of the two arches.

30.

A single arch as shown in the Palmer patent extends the full width of two openings of the screen, plus twice the diameter of the wire.

31.

The length of the arch shown in the Palmer patent is the width of two openings plus twice the diameter of the wire.

32.

The height of the arch shown in the Palmer patent is the diameter of the wire.

33.

The radius of the arch shown in the Palmer patent is that radius which would make an arc of uniform curvature of the length and height before mentioned.

34.

In plaintiffs' Exhibit 2, the adjacent arches on one wire of the screen intersect each other and the length of each arch is the width of two openings of the screen plus twice the diameter of the wire, and the crimp consists of the intersection of two adjacent arches.

35.

In plaintiffs' Exhibit 2 the height of the arch is the diameter of the wire.

36.

In plaintiffs Exhibit 2 the arch is of uniform curvature throughout its length.

37.

The wearing quality of the screen and the prevention of distortion of the mesh of the screen are of importance in the use of woven wire screens in classifying gravel and other abrasive substances on revolving, vibrator or shaker machines.

38.

The gradual intersecting arches with crimps formed by the intersections of the arches as shown in the Palmer patent gives a relatively smooth surface but not a flat surface on one side of the screen. This relatively smooth surface gives longer wear in use than screens having sudden bends on the wearing surface.

39.

The gradual intersecting arches as shown in the Palmer patent offer resistance to the shifting of the wire passing underneath the center of each arch, thus tending to prevent distortion of the size of the mesh.

40.

Each arch of the wire in a conventional double crimp screen extends only over one-half of the width of the two adjacent openings, plus the diameter of the wire separating the two openings. This shorter curvature of the wire in the double crimp screen causes that screen to have two uniform rough sides which wear more rapidly than the smoother surface of the Palmer screen.

41.

The Potter patent (#1139469) shows no curvature whatever in the portion of the wires of the screen between the cupped or crimped portions thereof. This straight wire between the cups or crimps shown in the Potter patent allows the intersecting wire passing under it to shift, thus dis-

torting the size of the mesh. Manufacturers who are making screens in accordance with the Potter patent are putting in as a modification thereof a nick on the underside of the straight wire to prevent the intersecting wire from shifting.

42.

The sharp cup or crimp shown in the Potter patent cannot be made by cold pressing high carbon spring steel wire without weakening the wire.

43.

The Galloway patent (#1907056) shows the same sharp cup or crimp as Potter, together with an additional sharp crimp in that portion of the wire which is straight in the Potter patent, and which is gradually arched in the Palmer patent. None of these sharp cups or crimps can be made by cold pressing high carbon spring steel wire without weakening the wire and the sharp upward bends caused by the additional crimp shown in the Galloway patent wear away rapidly in use.

44.

The slight roughness of the surface of the screen shown by Palmer in comparison to the flatness of the surface of the screen shown by Potter gives the Palmer screen more efficiency in passing through the screen a large volume of abrasive substances being classified.

45.

The screen manufactured by defendants which

is in evidence as plaintiffs' Exhibit 2 is made in accordance with the disclosures of the Palmer patent.

46.

All screens designed by J. E. Lippincott prior to August 2, 1934, and all screens manufactured by John A. Roebling Sons Company prior to the same date were the same as those shown by the Potter patent (#1139469), or were a variety of the conventional double crimp.

47.

All screens designed, built, manufactured and/or sold prior to August 2, 1934, by Manganese Steel Forge Co., The Abbey-Sherer Company, Frank M. Guess and Ludlow Saylor Wire Company were the same as those shown by the Potter patent (#1139469) or the Galloway patent (#1907056), or were a variety of the conventional double crimp.

48.

There is no evidence that any woven wire screen with the gradual arch and shallow crimp shown by Palmer was ever in public use or published by anyone other than Palmer prior to August 2, 1934.

49.

The invention of Palmer shown in the Palmer patent was not in public use nor on sale in this country nor published anywhere prior to two years before Palmer's application for a patent and said invention had not been abandoned to the public.

50.

Plaintiff Palmer was the first to design or build for use in classifying materials, a woven wire screen which contained gradual shallow arches, the intersections of two adjacent arches forming crimps, woven so as to make one side of the screen relatively smooth and the other side relatively rough, as shown in the Palmer patent.

51.

Prior to the time of the Palmer invention a person skilled in the art could build dies and presses to operate such dies which would shape wires into the form desired for the practice of the Palmer invention.

52.

Men with mechanical skill and with knowledge of the art can produce woven wire screens of any formation desired but until the disclosure was made by Palmer no person had conceived the formation shown by Palmer as a formation desirable for woven wire screens and no person had designed or built such a screen.

53.

The disclosures in the Palmer patent are sufficient to enable anyone skilled in the art to build a woven wire screen in accordance therewith.

54.

The screen disclosed by the Palmer patent is effective and useful for the purpose for which it

was designed, to wit, classifying abrasive substances.

55.

Claims one through four of the Palmer patent, read in the light of the disclosures and drawings contained in said patent, point out particularly and distinctly the improvement which said plaintiff claims as his invention, which is an arch and crimp of the precise character heretofore found, and enable one versed in the art to determine whether a screen is or is not within the claims of the Palmer patent.

56.

Claim five of the Palmer patent read in the light of the disclosures and drawings contained in said patent, points out particularly and distinctly the method of making the screen invented by Palmer and enables one skilled in the art to determine whether or not the method being used is that disclosed by Palmer.

57.

Defendants have failed to establish that one skilled in the art would be unable to construct a screen in accordance with the Palmer invention by reference to the claims and disclosures of the Palmer patent.

58.

Defendants have failed to establish that the Palmer screen was not novel or lacked invention and likewise have failed to establish lack of utility.

59.

Defendants have failed to establish that the method of making the Palmer screen claimed in claim five of the Palmer patent was not novel or lacked invention and likewise have failed to establish lack of utility.

60.

In addition to plaintiffs' Exhibit 2, defendants have manufactured and sold other screens with similar wire formation to that found in Exhibit 2, the length, height and radius of the arch varying with the size of wire and the size of the openings in the screen.

Done in Open Court this day of November, 1949.

.....,
Judge.

Wherefore, the court makes the following
Conclusion of Law

1.

This court has jurisdiction of this proceeding under the Patent Laws of the United States.

2.

Plaintiffs are the owners of the Palmer Patent No. 2074665, issued March 23, 1937.

3.

Plaintiff Palmer was, within the meaning of the provisions of the statutes of the United States then

in force, the first, original and sole inventor of a new and useful improvement in woven wire screens, as disclosed in said Letters Patent No. 2074665; that said Palmer duly and in all respects complied with the conditions and requirements of the statutes of the United States of America in such cases made and provided; that the application for his patent was made in accordance with the existing Acts of Congress and was in compliance in all respects with said laws of the United States.

4.

The invention of Palmer, patented as aforesaid, was not anticipated by the screen shown by Potter in Patent No. 1139469.

5.

The invention of Palmer, patented as aforesaid, was not anticipated by the screen shown by Gallo-way in Patent No. 1907056.

6.

The invention of Palmer, patented as aforesaid, was not anticipated by any screens designed, built or published by J. E. Lippincott or by John A. Roebling Sons Company.

7.

The invention of Palmer, patented as aforesaid, was not anticipated by any screens designed, built or published by L. W. Jones, Jr., Manganese Steel Forge Co., Frank M. Guess, Abbey-Sherer Company, Duncan C. Dobson, or Ludlow Saylor Wire Company.

8.

The screen invented by Palmer, patented as aforesaid, constituted an invention and discovery of a new and useful improvement to woven wire screens, and plaintiff Palmer was the original and first inventor thereof.

9.

The letters patent issued to Palmer, as aforesaid, are valid.

10.

Defendants have infringed said letters patent issued to Palmer.

11.

Under the Patent Laws of the United States of America, plaintiffs are entitled to an injunction against defendants, enjoining them from infringement of said letters patent issued to Palmer during the life of said patent.

12.

Plaintiffs are entitled to an accounting from defendant Pacific Wire Works Co. for profits and damages by reason of the manufacture and sale by said defendant, since April 20, 1948, of screens infringing on the patent issued to plaintiff Palmer.

13.

That plaintiffs are entitled to a judgment against defendant Pacific Wire Works Co. for treble the amount of said profits and damages, in view of the wilful and deliberate nature of the infringement.

14.

That plaintiffs are entitled to their costs in this action to be taxed and a reasonable attorney's fee.

Done in Open Court this day of November, 1949.

.....,

Judge.

Presented by:

/s/ F. A. LeSOURD,

Of Counsel for Plaintiffs.

Service of copy acknowledged.

[Endorsed]: Filed November 14, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT, ETC.

This cause having been duly set for trial in the above-entitled court, upon Tuesday, the 18th day of October, 1948, the Honorable John C. Bowen, Judge, presiding, the plaintiff, Samuel H. Palmer, being present in person, and the plaintiffs being represented by their counsel, F. A. LeSourd of Little, Leader, LeSourd & Palmer, and Paul Bliven, and the defendant, Karl H. Kaye, being present in person, and the defendants being represented by their counsel, Fred W. Catlett of Catlett, Hartman, Jarvis & Williams, and a large amount of evidence, both oral and written and in the form of exhibits, having been presented by both parties, and counsel

for both parties having been heard in argument, and the court being fully advised in the premises, now makes the following

Findings of Fact

I.

This action was brought for injunction and damages for infringement of United States Letters Patent No. 2074665, issued March 23, 1937, to the plaintiff, Samuel H. Palmer, for a woven wire screen.

II.

Plaintiffs, Samuel H. Palmer and C. A. White, are citizens of the State of Oregon, residing at Portland, Oregon, and are partners doing business as Western Fence & Wire Works of Portland, Oregon.

III.

The defendants, Karl H. Kaye and Matilda Kaye, are citizens of the State of Washington, Karl H. Kaye residing on Bainbridge Island and said Matilda Kaye residing in Seattle, within this district and division; that the defendant, Pacific Wire Works Co. is a corporation, organized and existing under the laws of the State of Washington, with its principal office and place of business in Seattle, Washington, within this district and division.

IV.

That the jurisdiction of this court is based upon the patent laws of the United States of America.

V.

That heretofore and on the 2nd day of August, 1934, the plaintiff, Samuel H. Palmer, then a citizen of the United States and of the State of Oregon and a resident of Portland, Oregon, filed an application for a patent on a woven wire screen, claiming to be the first original and sole inventor of a new and useful improvement of said type of screen; that said Samuel H. Palmer prosecuted said patent, and on March 23, 1937, Letters Patent of the United States signed, sealed and executed in due form provided by law, were issued to said Samuel H. Palmer for said claimed invention, and numbered 2074665, which said Letters Patent are now on record in the Patent Office of the United States.

VI.

That in 1944, plaintiffs, Samuel H. Palmer and C. A. White, formed a partnership under the name and style of Western Fence & Wire Works, to manufacture and sell, among other items, woven wire screens under the patent aforementioned, and the partnership agreement treated said patent as an asset of the partnership, and the plaintiff testified he intended by said instrument to transfer said patent to said partnership and plaintiffs are proper parties plaintiff.

VII.

Following an application by plaintiff, Samuel H. Palmer, for letters patent, the said Palmer, and thereafter the partnership composed of the plain-

tiffs, engaged in the manufacture of woven wire screens of the flat top type, generally speaking, and built up a substantial business for the manufacture and sale of such screens, especially for use in the sand and gravel industry.

VIII.

In 1944, the business now being conducted by the defendant, Pacific Wire Works Co., a corporation, was being carried on by Pacific Wire Works, Inc., a corporation; that Pacific Wire Works, Inc., a corporation, was disincorporated December 31, 1944; that the business now being conducted by the defendant, Pacific Wire Works Co., was conducted during the years 1945, 1946 and 1947 by a partnership composed of the defendants, Karl H. Kaye and Matilda Kaye, under the firm name and style of Pacific Wire Works Co.; that on December 31, 1947, that partnership was dissolved, and on January 1, 1948, Pacific Wire Works Co., a corporation, began business.

IX.

That prior to 1944 the Pacific Wire Works, Inc., had purchased screens from the plaintiff and, from time to time since, the partnership and Pacific Wire Works Co. have purchased some of plaintiffs' screens; that prior to 1944, the defendants were not manufacturing screens of this type themselves, but in 1944, deeming that competition compelled them to do so, they began to manufacture screens of a flat top type, generally speaking, with openings one and one-quarter inch ($1\frac{1}{4}$ ") up to four inches

(4"); that plaintiffs made screens of the smaller types, but the defendants, except for a few of the one and one-quarter inch ($1\frac{1}{4}$ "), do not make screens of the flat top type, generally speaking, in the lower sizes; that the plaintiffs' range also runs as high as six inches (6"); that defendants, during the respective period aforementioned and since 1944 have manufactured, sold and used or caused to be manufactured, sold and used within this district and division and elsewhere within the United States woven wire screens of the flat top type, generally speaking, and have also built up a substantial business in selling said screens, many of which are for use in the sand and gravel industry.

X.

That plaintiff, Samuel H. Palmer, on or about April 20, 1948, notified defendant, Karl H. Kaye, that in his judgment the defendant, Pacific Wire Works Co., was infringing his patent; that the defendants denied that their screens infringed the plaintiff's patent and continued to manufacture screens of the flat top type, generally speaking.

XI.

That the parties hereto prior to trial stipulated that they would first try out the question of infringement and that the question of damages, if any, should be dealt with later.

XII.

That the defendants, Karl H. Kaye, and Matilda Kaye, are not now manufacturing or selling said

wire screens and have not since the 31st day of December, 1947.

XIII.

That the one known feature which identifies the flat top type screen is that the crimps are all on one side of the screen, and there is a practically flat wearing surface on the other; that the plaintiffs' and the defendants' screens are both of the flat top type, generally speaking; that prior to the plaintiffs' application for a patent, patents for flat top types of screen had been issued as follows:

Winfield Scott Potter, Pittsburgh, Pennsylvania, Patent No. 1139469, granted May 11, 1915;

James W. Galloway, Hamilton, Ontario, Canada, Patent No. 1907056, granted May 2, 1933. Application filed May 21st, 1932, and in Canada January 22, 1932.

XIV.

That the plaintiffs produced in evidence only one sample of the range of screens they make, to wit, a one and one-half inch ($1\frac{1}{2}$ ") mesh; that the defendants produced a large number of samples of wires which go into the different meshes they make; that from the claims of the patent and from the evidence in the case, including statements of the plaintiff, Palmer, it would be impossible for anyone, even though acquainted with the art, to duplicate with certainty the Palmer screen or avoid such duplication; that the screens are manufactured by

the defendants by a punch, and that when the plunger on the punch descends, the wire on both sides of the crimp will spring up, and, if held down at points some distance from the plunger, will naturally form an arch; that to avoid this arch it is necessary to use pads to prevent it from forming, or flatten it out; that manufacturers of screens generally regard the arch as a disadvantage and endeavor in every way to eliminate it; that this arch was known long before plaintiffs' patent and that the manufacturers deliberately reduced or removed it.

XV.

That from all of the evidence, the Court concludes that the claims of the plaintiffs set forth in the Palmer patent have no novelty; that they do not represent any invention, or any improvement over prior art or any change or improvement which would not readily occur to a skilled mechanic familiar with screen making; that the ideas in said patent claimed to be new were either known to prior art or anticipated by the Potter and Galloway patents and the screens marketed and sold thereunder; that there is no utility in the claimed invention, and that the claims do not contain a written description of the invention and discovery sufficient to point out particularly, and do not distinctly claim the part or improvement or combination which Palmer claims as his invention so as to inform the public the limits of the monopoly asserted, and so that the public may know which features may be safely used or

manufactured without a license and those which may not.

XVI.

That even though the patent of plaintiffs did not lack invention, novelty, utility, definiteness and any advance on the prior art, the screens manufactured by the defendants do not infringe upon the plaintiffs' patent.

Done in Open Court this 14th day of November, 1949.

/s/ JOHN C. BOWEN,
Judge.

Wherefore, the Court makes the following

Conclusions of Law

I.

That each and every one of the five claims of plaintiffs' patent is invalid because of lack of invention, novelty, utility, definiteness, and any advance on the prior art.

II.

That the screens made by the defendants do not infringe any of the plaintiffs' claims.

III.

That the plaintiffs are not entitled to any injunction against the defendants or any accounting of profits and damages or any costs, nor are defendants entitled to any costs or allowances against plaintiffs.

Done in Open Court this 14th day of November, 1949.

/s/ JOHN C. BOWEN,
Judge.

Presented by:

CATLETT, HARTMAN, JARVIS
& WILLIAMS.

Receipt of copy acknowledged.

[Endorsed]: Filed November 14, 1949.

In the United States District Court for the Western
District of Washington, Northern Division

Civil Action File No. 2106

SAMUEL H. PALMER and C. A. WHITE, Part-
ners Doing Business as WESTERN FENCE
& WIRE WORKS,

Plaintiffs,

vs.

KARL H. KAYE, MATILDA KAYE and
PACIFIC WIRE WORKS CO., a Corporation,
Defendants.

DECREE

This matter coming on regularly for trial before the above-entitled court, Judge John C. Bowen presiding, and having been set for trial on the 18th day of October, 1949, plaintiff, Samuel H. Palmer, being present in person and the plaintiffs being repre-

sented by F. A. LeSourd of Little, Leader, LeSourd & Palmer, and Paul Bliven, and the defendant, Karl H. Kaye, being present in person and defendants being represented by Fred W. Catlett of Catlett, Hartman, Jarvis & Williams, and a large amount of evidence, both oral and documentary and by way of exhibits, having been presented by both parties, and counsel for both parties having been heard in argument, and the court having heretofore made findings of fact and conclusions of law in favor of defendants,

It Is Hereby Ordered, Adjudged and Decreed that Patent No. 2074665, issued March 23, 1937, to Samuel H. Palmer, is, in respect to each and every one of its five claims, invalid; that if valid, the screens manufactured by the defendants have in no wise infringed said patent, and the screens now being manufactured do not infringe on said patent; that the plaintiffs are entitled to no relief under their complaint; but no costs are allowed.

Done in Open Court this 14th day of November, 1949.

/s/ JOHN C. BOWEN,
Judge.

Presented by:

CATLETT, HARTMAN, JARVIS &
WILLIAMS.

Receipt of Copy Acknowledged.

[Endorsed]: Filed November 14, 1949.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Come Now the plaintiffs by and through their attorneys, F. A. LeSourd and Paul Bliven of Seattle, Washington, and move the court for a new trial in this cause, and for the reopening of the decree, the making of new findings of fact and conclusions of law, and the entry of a decree in favor of the plaintiffs on the following grounds:

1. In holding that the written description of the invention and discovery is not sufficient to point out particularly the part or improvement or combination which Palmer claims as his invention and that from the patent and the evidence, it would be impossible for one acquainted with the art to duplicate with certainty the Palmer screen or avoid such duplication, the Court has decided this case on an issue not raised by the pleadings and as to which no direct evidence was introduced, thus depriving plaintiffs of the opportunity of meeting such a contention. An objection to a patent on the ground that the terms of either the specifications or claims thereof are not sufficiently full, clear, concise and exact to enable any person skilled in the art to duplicate or practice the invention must be raised in the pleadings.

2. This court has failed to give effect to the applicable decisions of the Supreme Court of the United States requiring defendants to establish the

invalidity of plaintiffs' patent beyond a reasonable doubt.

3. This court has erred in holding that plaintiff Palmer's invention was anticipated by the Potter and Galloway patents.

4. This court has erred in holding that plaintiff Palmer's patent exhibited only mechanical skill.

5. This court has erred in holding that a person skilled in the art could not practice plaintiff Palmer's invention from the disclosures made in his patent.

6. This court erred in holding that the claims of the Palmer patent are not sufficiently clear to inform the public of what is within the patent and what is not.

7. This court erred in holding that the arch shown in the Palmer patent was formed naturally in the process of crimping, rather than being intentionally formed by the shape of the dies.

8. This court erred in finding that the screens are manufactured by a punch instead of a die.

9. If the last clause of Paragraph XIV of the court's findings of fact herein is intended to be a finding that the arch shown in the Palmer patent was known long before Palmer's invention, then the court erred in so finding.

10. The court erred in finding that the claims in the Palmer patent do not represent any invention, or any change or improvement over the prior art.

11. That if the next to last clause of Paragraph XIV and the fourth clause of Paragraph XV of the findings of fact herein, are intended to be a finding that the matter covered by the Palmer patent was not useful at the time for the purposes set forth in the patent, that is, useful within the meaning of the patent law, capable of being beneficially used for the purpose for which it was designed, then the court also erred in so finding.

12. The court erred in finding that even though the Palmer patent does not lack invention, novelty, utility, definiteness and any advance on the prior art, the screens manufactured by the defendants do not infringe upon the plaintiff's patent.

Dated this 23rd day of November, 1949

/s/ F. A. LsSOURD,

/s/ PAUL BLIVEN,

Attorneys for Plaintiffs.

Receipt of Copy Acknowledged.

[Endorsed]: Filed November 23, 1949.

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR
NEW TRIAL

This matter coming on regularly for hearing before the above-entitled court, Judge John C. Bowen presiding, upon the 5th day of December, 1949, at

2:00 o'clock p.m., the plaintiffs being represented by their counsel, F. A. LeSourd and Paul Bliven, and the defendants by their counsel, Fred W. Catlett, and both parties having been heard in argument, and the court being fully advised in the premises,

It is Hereby Ordered, Adjudged and Decreed that the plaintiff's motion for new trial be and it is hereby denied.

Done In Open Court this 5th day of December, 1949.

/s/ JOHN C. BOWEN,
Judge.

Presented by:

/s/ FRED W. CATLETT,
Attorney for Defendants.

Approved as to form:

& exception taken

/s/ F. A. LeSOURD,
Attorney for Plaintiffs.

Receipt of Copy Acknowledged.

[Endorsed]: Filed December 5, 1949.

In the United States District Court for the Western
District of Washington, Northern Division

No. 2106

SAMUEL H. PALMER and C. A. WHITE, d/b/a
WESTERN FENCE & WIRE WORKS,
Plaintiffs,

vs.

KARL H. KAYE, MATILDA KAYE and
PACIFIC WIRE WORKS CO., a Corporation,
Defendants.

COURT'S DECISION ON PLAINTIFFS'
MOTION FOR NEW TRIAL

The Court: I have listened with interest to this point made by counsel for plaintiffs, that the issue involving definiteness of the formula for the plaintiffs' patent process was not brought to his attention in time for him to meet that issue during the trial, and in that connection I think it appropriate to say that if counsel were an inexperienced attorney at the bar if, he had not done much trial work before this case, that argument would have much stronger weight with the Court than it does by reason of the circumstances that this Court knows that counsel on both sides of this case are among the ablest members of the local bar, both from the standpoint of their professional preparation for the practice of law and from the standpoint of their actual experience in the practice of law.

Plaintiffs' counsel is no exception to that statement. He had a legal training in his student days that compares with the best afforded in the nation's best law schools. He had a splendid public experience in the Department of Justice at the National Capital, and following that he was a successful member of the bar of the District of Columbia, all of which distinguished him as an able lawyer and an able practitioner of the law in that jurisdiction. Since he resumed active practice at the Seattle bar, he has been a member of one of the leading law firms of this city, and has participated in some of the city's most desirable and important law business, both in and out of court.

I am sure that he must have appreciated that the matter which is the subject of his comment in connection with this motion for new trial was an important point in the progress of the trial, and I am sure that if he had actually been dissatisfied with the circumstance that that issue was not, as he now claims for the first time in connection with the motion for new trial, properly within the issues of the case, his outstanding legal ability would have suggested the propriety of his making such an objection at some appropriate time during the trial.

I do not feel that the plaintiffs have been prejudiced by anything related to that circumstance, because the point was inquired of on more than one occasion during the trial, and I am sure that whatever importance it assumed in the Court's mind must have been brought to the attention of all those

connected with the trial near the beginning of the trial, which lasted approximately four days. During that period there was plenty of time for plaintiffs' counsel to appropriately advise the Court of plaintiffs' objection that the patent process formula evidence was not within the pleadings. Plaintiffs' counsel did not do that until the motion for new trial was made.

With respect to the merits of the case, I do not see anything in the present argument on the motion for new trial which was not fully explored and considered by counsel on both sides and also by the trial judge during the trial and at the conclusion thereof when the case was being argued and considered on its merits.

In my opinion, one reason, in addition to those previously stated, why plaintiffs' patent is invalid is that, after all is said and done about this case and all of the evidence relating to it, the basic primary principle of gravel screen wire weaving involved in plaintiffs' patent has been known to cloth weavers for generations. It is basically and primarily nothing more than the ordinary basket weave style of weaving ordinarily employed in the cloth weaving industry.

The only way you can get in plaintiffs' gravel screen wire net weaving process any variations of that basic primary principle of basket weaving of cloth is to introduce some discussion and consideration about the different kinds or sizes of the wires to be used in making the wire net gravel screen, instead

of, if you were weaving cloth, discussing and considering the kinds or sizes of warp and woof that might be used in making the ordinary basket weave style of cloth weaving. But in such considerations, as applied to plaintiffs' patent process, is to be disclosed no valid patent.

The motion for new trial is denied.

[Endorsed]: Filed December 22, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Karl H. Kaye, Matilda Kaye and Pacific Wire Works Co., a Corporation, and Catlett, Hartman, Jarvis & Williams, their Attorneys:

Notice Is Hereby Given that Samuel H. Palmer and C. A. White, petitioners above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgement entered in this action on November 14, 1949, and the denial of petitioners' motion for a new trial on December 5, 1949.

/s/ F. A. LeSOURD.

Attorneys for Petitioners, Samuel H. Palmer and C. A. White, Partners Doing Business as Western Fence & Wire Works.

[Endorsed]: Filed December 20, 1949.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
RECORD ON APPEAL

This Matter having come on before this Court on the motion of the petitioners, by and through their attorneys for an order extending the time for filing the record on appeal and docketing the action, and the Court having considered said motion and the affidavit in support thereof and being duly advised in the premises, now, therefore,

It is hereby Ordered that the time for filing the record on appeal and docketing the action be, and it is hereby extended to March 13, 1950.

Done In Open Court this 23rd day of December, 1949.

/s/ JOHN C. BOWEN,
Judge.

Submitted by:

/s/ F. A. LeSOURD,
Attorney for Petitioners.

Approved:

CATLETT, HARTMAN, JARVIS &
WILLIAMS,
Attorneys for Respondents.

[Endorsed]: Filed December 23, 1949.

[Title of District Court and Cause.]

PLAINTIFFS' DESIGNATION OF
RECORD ON APPEAL

To the Clerk of the Above-Entitled Court:

Please transmit as the Record on appeal in this case the entire file in the Clerk's original file in this case, including plaintiff's Narrative Statement of the Proceedings at the Trial, plaintiffs' Statement of Points and this Designation.

Dated this 28th day of February, 1950.

/s/ F. A. LeSOURD,
LITTLE, LEADER,
LeSOURD & PALMER,
Attorneys for Plaintiffs

Receipt of Copy Acknowledged.

[Endorsed]: Filed March 1, 1950.

In the District Court of the United States for the
Western District of Washington Northern Di-
vision

No. 2106

SAMUEL H. PALMER and C. A. WHITE, Part-
ners Doing Business as WESTERN FENCE
& WIRE WORKS,

Plaintiffs,

vs.

KARL H. KAYE, MATILDA KAYE and PA-
CIFIC WIRE WORKS CO., a Corporation,
Defendants.

Before: The Honorable John C. Bowen,
District Judge.

NARRATIVE STATEMENT OF TRAN-
SCRIPT OF PROCEEDINGS AT TRIAL

Seattle, Washington

October 18, 1949, 10:00 o'Clock A.M.

F. A. LeSOURD, of
LITTLE, LEADER, LeSOURD & PALMER,
PAUL BLIVEN,

Appearing for and on Behalf of Plaintiffs.

FRED W. CATLETT, of
CATLETT, HARTMAN, JARVIS &
WILLIAMS,

Appearing for and on Behalf of Defend-
ants.

The case was called for trial by the court and both parties answered ready, whereupon the following proceedings were had. (Plaintiffs' Exhibits 1, 8, 9, 10, 11, 15 and 16; Defendants' Exhibit A-6, previously admitted in pretrial hearing.) Plaintiffs' Exhibit 18 was admitted subject to objection of defendants to check to see if it was an accurate photostat. Plaintiffs' Exhibits 12, 13 and 14 were admitted. Defendants' Exhibits A-9 to A-27 were admitted. Plaintiffs' Exhibit 19 was marked for identification. Defendants' Exhibit A-28 was marked for identification.

Whereupon, opening statements having been made by counsel for plaintiffs and counsel for defendants, the following proceedings were had:

MITCHELL T. BOWIE

called as a witness by and on behalf of plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination

In answer to questions by Mr. LeSourd, the witness testified:

My name is Mitchell T. Bowie and I reside at 1519 East 50th, Seattle. I have been a resident of Seattle about forty years. I am not actively engaged in business at this time, but [1*] have some property to keep up. My business previously was electrical con-

* Page numbering appearing at bottom of page of original certified Transcript of Record.

(Testimony of Mitchell T. Bowie.)

tracting and dealer in Ballard, where I was in business thirty-three years. I have no interest in the present lawsuit.

Plaintiffs' Exhibit 2 is a screen I bought from Pacific Wire Works Company. I ordered the screen over the telephone, ordering a duplicate of one they had sold to Reliance Supply in December, 1947. I made a mistake in ordering the size of the openings, and after they checked they called me back and told me it was 11½ opening. I had a 11½ by 11½ when I talked to him. I told him to make it a duplicate of the one they got in December, 1947, from Pacific Wire Works.

The individual in calling back did not identify himself as calling from the Pacific Wire Works Company because I never asked him because I had put the order in to them and he had called me back and told me that the one they had made before was an inch and a half opening, and I suppose by that he checked the invoice of the one in 1947 to know, because I didn't ask him questions about it, didn't ask him a thing. I don't know the name of the person I talked to. I never asked. In calling back, he referred to my previous order of this type screen which was placed with the Pacific Wire Works Company.

Later I took delivery of the screen at the Pacific Wire Works factory, where I called personally, and Plaintiffs' Exhibit 2 was delivered to me. I made them a check before they made the screen. They wouldn't make it until I paid them, and I sent the

(Testimony of Mitchell T. Bowie.)

check to them. They said it would be ready in a certain time, and it wasn't ready the day it was supposed to be. I called them the next day and went down and picked it up.

Plaintiffs' Exhibit 19 is the invoice I got at the time I got the screen. I got the invoice from the young fellow [2] there, the gentleman at the end of the table. It was a slim young fellow, I know. That was at the Pacific Wire Works Company. (Mr. Catlett stated that the gentleman's name was Mr. Thacker.) I was delivered this invoice.

(Mr. LeSourd moved the admission of Plaintiffs' Exhibit 2 and Plaintiffs' Exhibit 19.)

In answer to questions by Mr. Catlett, the witness testified:

I identified Plaintiffs' Exhibit 2 because I tied the wire on the end, and I have got three file marks on a spot there in the screen. I took the screen home and then Mr. Palmer come and got it, and from there I don't know where it has been. Mr. Palmer is the plaintiff in this case. I delivered it to him just a day or two after I got it. I couldn't tell you. That was two or three weeks ago. It hasn't been in my possession for at least three weeks. (Plaintiffs' Exhibits 2 and 19 were received in evidence.)

Cross-Examination

In answer to questions by Mr. Catlett, the witness testified:

I am not related to Mr. Palmer. My connection

(Testimony of Mitchell T. Bowie.)

with him is that I have known him since we were quite young men. We have been friends for 30—about 36 years. I bought this screen because Harris asked me to get it for him. Harris is Mr. Palmer. I didn't have any use for it myself, and didn't buy it for my use. I asked for a duplicate of the screen manufactured back in 1947 because he asked me to get a duplicate of that screen. He told me what particular screen he wanted duplicated. Mr. Palmer paid me for the screen.

SAMUEL H. PALMER

called as a witness by and on behalf of plaintiffs, having been first duly sworn, was examined and testified as follows: [3]

Direct Examination

In answer to questions by Mr. LeSourd, the witness testified:

My name is Samuel H. Palmer, and I am the person referred to by the last witness as Harris Palmer. The H. stands for Harris. I am sixty years old and reside at the present time in Portland, Oregon. I am manager and partner of the Western Fence and Wire Works. I am the Samuel H. Palmer named as inventor in the United States Patent No. 2074665, which was granted March 23, 1937, and is here admitted as Plaintiffs' Exhibit 1. Western Fence and Wire Works is a partnership doing business under that assumed name. This partnership was formed in 1942, the other partner being C. A. White. He is

(Testimony of Samuel H. Palmer.)

the only other partner. The patent is an asset of the partnership, which would be the owner, I presume. The partnership now holds the right to this patent.

I am one of the plaintiffs in the present action. My experience in metal working industry started in the winter of 1907 and 1908 when I went to work for the Seattle Wire and Iron Works as an apprentice, to become an ornamental wire and iron worker. I served my apprenticeship under the same man that ran the Seattle Wire and Iron Works, with the exception of one interruption where I worked, I would say, about four months with the Pacific Wire Works, or Pacific Wire and Plating, it was known in those days. Then I became a journeyman. I moved around a little, worked at different shops to broaden by experience and during the year 1913 I worked in Portland. At that time business was kind of quiet and I came back to Seattle and went into the electrical business and remained in that for a period of about five years, or until the Armistice was signed. I was working with the Skinner & Eddy Shipyard Corporation, and from there I left and went back to Portland and took the foremanship [4] of the wire department of the Northwest Fence and Wire Works at Portland, and I worked there until 1928. At that time, I was superintendent and assistant manager.

In 1928 the corporation was purchased by the United States Steel Corporation and merged with

(Testimony of Samuel H. Palmer.)

the Cyclone Fence Company. I remained at the head of that for two more years. Then the depression hit us and knocked us out of a job, and about that time the wire screen business got to a point where there was no demand for it. Up until the early twenties, there was very little use in wire screens for industrial purposes. What I mean by that is the screening of aggregate, mining, and so forth, but in those later years I have had—with my position, I came in contact with the users or the potential users, more or less, and the weak spot was to get a good wire screen.

I was foreman and then assistant superintendent of Northwest Fence and Wire Works between 1918 to 1928. They were the leading wire fabricators in the Northwest, I would say, in the industrial wire screen, and my business was to manufacture—to see that they were manufactured. I was in charge of the manufacturing and was fully responsible for the design of their products. Also I had responsibilities with regard to the design of the tools by which those products were made.

The Northwest Fence and Wire Works was sold to United States Steel in 1928. I remained there and took charge of that division that they just recently purchased as manager of the Northwest territory, sales manager. We took care of the sales and what fabricating there was done in the Northwest. That was for a subsidiary of the American Steel and Wire Company, which they merged it with.

While I was with Northwest Fence and Wire

(Testimony of Samuel H. Palmer.)

Works, the fabricating was all custom-built work. The fabricating that we [5] had to do with in Portland was custom-built and made to order. Gravel screens had been manufactured by the old Northwest company. They inherited this business when they purchased it, so we carried it on. The Northwest Fence and Wire Works at the time I was with them made quite a variety of products. They had wire gravel screens in the small sizes, and wire window guards, partition work, wire partitions, window grilles, ornamental iron work and custom built gates. When I was with American Steel and Wire their products were manufactured in the East. They had a branch plant in Oakland and their main product that we handled was chain link fence, chain link wire fence used for industrial and estates purposes. They sold gravel screens only through the Portland setup. I was in Portland during all of this period.

I terminated my work with American Steel and Wire in the fall of 1931. The plant had closed down because of the depression. I thought I better get out and make a good gravel screen so I started to work on it to create a job for myself. My employment terminated the latter part of 1931, but I didn't get out for myself until the first part of 1932. It took me a few months to get on my feet, get straightened around, know what to do. In the first part of 1932 I started to build myself a loom and set up business for myself in the wire business, chiefly sand and gravel screen and industrial wire cloth, and we also took on little sales agencies in order to keep going.

(Testimony of Samuel H. Palmer.)

I called my business the Western Fence and Wire Works. We started to develop a gravel screen. There was very few wire screens used for that purpose in those days under, we will say, $\frac{3}{4}$ of an inch opening, very few above that. They used boiler plate. I say they used very few gravel screens made of wire, a small amount of them previously in the twenties. I refer to the public [6] generally due to the fact that they didn't seem to stand up and they didn't stand up, so what was used was boiler plate with holes punched in it. My experience has been that ninety per cent was boiler plate and by making a screen with better wire and more lasting qualities, we developed it into something pretty good.

With regard to the other type of screens which were in use besides the flat boiler plate with holes punched in it, at the old company we manufactured a screen wire with what we would call a double crimp. Plaintiffs' Exhibit 8 is a double crimp. The characteristics of a double crimp are that all crimps are exactly the same, this wire and this wire (indicating). The crimp is this indentation (indicating). The crimp is exactly the same on both sides. When we refer to the crimp we refer to the forming of the wire, the indentations of the wire, the bending of the wire into the crimps, the short kinks makes the crimp. In the double crimp when the wire is woven into the screen the indentation on one side of the wire is the same as the indentation on the other side of the wire. You take the straight wire and make an equal indentation on both sides, running it through

(Testimony of Samuel H. Palmer.)

a set of gear wheels, and each tooth would press it out of its original shape. This double crimp screen has been in use 300 or 400 years, maybe, ever since the discovery of wire. I might express it this way, the double crimp screen is woven the same as a piece of cloth, over and under.

In the gravel industry the use of the screen is for the sizing and classifying of crushed rock, concrete, aggregates, and ore, mining ore. In the gravel and like industries the most efficient way that is done today, they have a vibrating frame which is called the vibrating screen, and these screen cloth sections which we are talking about is the screen that fits into these frames with the exact size openings and classifies the [7] aggregate by passing over and through these holes, through the mesh. They usually use one screen on top of another. They are made in decks. There is four, three and two deck screens and there is also single deck screens. They make them in decks to get different classifications. They will have a different size opening screen on one deck and a different one on the other, and so on, whatever the specifications call for. The result that would have in segregating the different sizes of gravel is that it would allow—like we were asking for—the specifications call for, for example, three-quarters minus. You would have a three-quarter screen and all the rock that was three-quarter size and less would drop through there. Then you would have a rejection of the quarter inch out of the three-quarters. Then

(Testimony of Samuel H. Palmer.)

you put a quarter inch screen deck under this one to reject the quarter, and the material flowing down onto the small mesh would flow off of this screen into the proper bunkers, where it is classified and weighed out.

I have called these vibrators because they are mechanical vibrating machines to shake it, to give it the screening action. The screen frame moves. The rate at which it moves all depends on just what you are doing and the weight of the material. I would say from 800 to 3200 vibrations per minute. We have some magnetic types that run even a little bit faster than that. The manufacturers have their own idea on the amplitude of movement of the screens. Some of them are making a shaker type and some of them have an oscillating type, and some of them just shake it up and down. With regard to how far they move, they are all adjustable. The limit, I would say, would be about $\frac{3}{8}$ of an inch. That is as far as the vibrators go. They are adjustable from nothing to $\frac{3}{8}$ of an inch. These screens move at the rate per minute to which I have testified, and will move from one side to [8] the other from zero to $\frac{3}{8}$ of an inch. The movement of most of them is up and down or endwise. They are built on a pitch. The screen is set on about a 45 pitch, and that pitch is also adjustable according to the material, and it shakes endwise. The screens are assembled so that it is, say, 3 by 10 or 4 by 12 and the material travels from one end to the other. In an efficient plant, running in the average material, I would estimate the load carried

(Testimony of Samuel H. Palmer.)

by the screens as about 6000 pounds per square foot per hour. That may vary a trifle one way or the other, but it will average that. By 6000 pounds I mean that weight in crushed rock, say. That is delivered onto the screen by means of a conveyor. The conveyor brings this material up and dumps it onto the screen at the average rate of 6000 pounds per square foot per hour. A good screen should run about 150 to 200 yards per hour.

With regard to the advantages or disadvantages of the double crimp type screen, used in the manner that I have testified to, the double crimp, to my estimation, is about the best—well, has the most efficiency of any screen on the market, due to the fact that it is not perfectly smooth. It is rough, but the objectionable part is that it has the sharp crimps on the wearing side of the screen, and these crimps wear off and then your screen goes to pieces. At the time I commenced my business in 1932 the other types of screens in use for this purpose included a flat top screen made by, I think, the Audubon Wire & Cloth Company. They were manufacturing it at that time, and that was patented under the Potter patent which was about to run out. Plaintiffs' Exhibit No. 7 is identical to the Potter screen. I made Plaintiffs' Exhibit No. 7 in accordance with the Potter patent.

In answer to questions by Mr. Catlett, the witness testified:

I made Plaintiffs' Exhibit No. 7 about three months ago. No, I made it about a year ago. I made it for the purpose of using it at this trial.

(Testimony of Samuel H. Palmer.)

I wanted to show the difference. I experimented with screens under the Potter patent before, and had made a few for sale. I am not licensed under the Potter patent, but made them anyway. We put a little lock notch in them first, something like they do down in California.

(Plaintiffs' Exhibit 7 received in evidence.)

In answer to questions by Mr. LeSourd, the witness testified:

Plaintiffs' Exhibit No. 5 is the same as the Potter patent. I made Plaintiffs' Exhibit No. 5 and it is identical with the Potter patent.

In answer to questions by Mr. Catlett, the witness testified:

I made this screen about three weeks ago for the purpose of use in this case to demonstrate. I made it this size so it would be convenient to handle. I presume that the wire works don't make one with the arch top in a screen of this size. However, we do.

In answer to questions by the Court, the witness testified:

I spoke of Plaintiffs' Exhibit 8 as illustrating the double crimp form of screen. In Plaintiffs' Exhibit No. 7, the characteristic so far as form or shape of the wire is concerned is that the wire is crimped with one deep crimp and then it has a straight line over and across the next cross wire

(Testimony of Samuel H. Palmer.)

and then has another deep crimp to receive the alternate cross wire, which gives it a flat surface on one side and all the crimps or bumps on the opposite side.

In answer to questions by Mr. LeSourd, the witness testified:

The characteristic of Plaintiffs' Exhibit 7 may be put this way, that the crimps are all in one direction, leaving the [10] space between the crimps straight. The wire that is spaced between the crimps is straight. This form of wire shown in Plaintiffs' Exhibit 7 is disclosed in the Potter patent. The distinctive feature of the Potter patent type of screen is that it has a perfectly flush surface on one side and rough on the opposite side. Plaintiffs' Exhibit 5 is an example of that same characteristic.

(Plaintiffs' Exhibit 5 received in evidence.)

When I commenced business for myself in 1932 we started to manufacture and sell a screen of the ordinary double crimp and then we worked along towards the flat top and finally arrived at the one we are making today. I sold some of the Potter screens along in August—that was in June, 1932. We found that the Potter screen wasn't much of an improvement over the punched plate. The advantages of the Potter screen or the flat top screen over the previous screens were that being flush on one side it produced a greater wearing surface,

(Testimony of Samuel H. Palmer.)

and the objectionable part was that it was smooth similar to the punched perforated plate, and the material would have a tendency to slide over it instead of through it. It was not quite as efficient as the other type screens that were used previously in production, but they would outwear the former screens. The former screens were the double crimp screens. I can't say that the Potter screen had any other advantages or disadvantages. The one disadvantage was in the fabricating, that it was necessary to make that crimp so sharp and deep that it was not permissible to use as high a carbon or as high a tensile strength wire as if you could eliminate that. In 1932 90% of the wire used for gravel screens was bright basic known as bright basic low carbon wire. The other types were a high carbon hard drawn and oil-tempered, and there was some made of oil-tempered, and some made of high carbon, [11] hard drawn. With regards to the words "high carbon" and "low carbon," we refer to them as 45 per cent carbon and higher is high carbon, but low carbon usually runs around 15 per cent. When I speak of high or low carbon, I am referring to a characteristic of the wire. It has a carbon content which permits the wire to be drawn to a higher tensile strength. The high and low carbon refers to the carbon content of the wire. That carbon content has something to do with the tensile strength of the wire. High carbon wire can be drawn to a higher tensile

(Testimony of Samuel H. Palmer.)

strength than a low carbon. The high carbon wire is used in our screen today. We sell that screen under the name of Flint screen, but it is under the Palmer patent. We call it the arch crimp. This high carbon has been used in the so-called double crimp screens where the mesh was not too close or too tight. If you made a close mesh with this high carbon wire, you would have your crimp, your wire, so deep it would fracture in the manufacture. That is in the double crimp, it would fracture and separate. The high carbon is the most desirable for use in gravel screens because it lasts longer. It resists the abrasion better.

High carbon wire could not satisfactorily be used in making a screen under the Potter patent. You couldn't use as high a carbon as we are using today, because it would fracture in the short one-way crimp.

In 1932, we will say, 1929, the federal specifications became very rigid. This new oil mat came out which they are using on the highways, and they were very specific in their classifications to the aggregate, and they held us to a five per cent tolerance. By a five per cent tolerance I mean that if they asked for a three-quarter rock, for example, they would allow five per cent over or above in quantity production. An oil [12] mat is a non-skid surface that is put on top of concrete or macadam pavement. By the five per cent tolerance, I mean that the rock was not acceptable if it was more

(Testimony of Samuel H. Palmer.)

than five per cent larger than or less than five per cent smaller. They are very particular on that. These specifications mean that the mesh had to be almost perfect and they had to be made rigid enough to prevent distortion in use, distortion of the mesh in use. If you had distortion, you wouldn't get your classification due to the fact that you would have large and small holes throughout your screen. By distortion I mean that the wires would shift so that the opening would be larger or smaller.

Considering the advantage or disadvantage of the Potter patent with relation to distortion, the Potter patent has nothing to hold it in mesh, because one crimp is entirely removed, and there is absolutely nothing to hold it, and the excessive vibrations would shift it. Referring to Plaintiffs' Exhibit 7, your short crimp is underneath on the bottom and there is no crimp on the topside. The flat side where it crosses the next cross wire. It has a tendency to shift, nothing to hold it. With regard to the direction of shifting, every other one will go either forward or back, as demonstrated here. It shifts along the bottom side of the flat wire.

I attempted to develop a screen to meet these objections. I lessened the short crimp, made that not quite so deep, and then put the balance of the crimp in the long sloping arch, sufficient to prevent the shifting of the cross wire. Plaintiffs' Exhibit 1 is the screen that I developed. We found in our

(Testimony of Samuel H. Palmer.)

practice that it would hold its mesh throughout the life of the screen. The screen was developed in this way. We put a short crimp on the bottom—we will call it the back of the screen, and in that short crimp rested every other cross wire, or every other cross wire [13] rested in this short crimp, and the short crimp on the opposite wire rested in a slight arch which projected from one short crimp to the other. Each wire in the screen was formed with a sharp crimp and on every other mesh—we had a short crimp, and we would pass over the following wire, which was the next mesh, with a slight arch. There was a slight convex shape between the two short crimps. I use the words “convex” and “arch,” a slight arch, it is the same thing.

In answer to questions by the Court, the witness testified:

We had two short crimps at the end of the arch. We have one short crimp, then a long arch, then a short crimp. The long arch runs the same direction as the wire.

In answer to questions by Mr. LeSourd, the witness testified:

The arch is on the opposite side of the wire as compared to the crimp. The short crimps are all on one side of the wire and the arch is on the other side of the wire between those two short crimps. The crimps and arch alternate. We have a short crimp, then we have a long arch, then we have a

(Testimony of Samuel H. Palmer.)

short crimp. The short crimps are all on the down side of the wire, we will say, and the arches are all on the top side, and they alternate throughout the length and width of the screen or the wire, so I have this entire wire comprising a series of a short crimp and then a long arch and then a short crimp and then a long arch throughout the length of the wire. The crimps are all on one side of the wire and the arches are all on the other side of the wire. When woven together it makes a right and a wrong side to the screen.

(At 12:05 o'clock p.m., Tuesday, October 18, 1949, proceedings recessed until 1:30 o'clock p.m., Tuesday, October 18, 1949.)

October 18, 1949, 1:30 o'Clock P.M.

In answer to questions by Mr. LeSourd, the witness testified:

With regard to the shape of each rod in the screen that I invented, each rod is formed with a series of short crimps, alternated by a long elongated arch between the short crimps. The short crimps are all in one direction and the arch in the opposite direction. With regard to the meaning of the terms "crimp" and "arch," what we meant is the crimp is on the down side of the screen, is made as short as possible without fracturing the wire. When I say as short as possible, I am speaking of the length of the crimp. The arch is made as shal-

(Testimony of Samuel H. Palmer.)

low as possible but still sufficient to prevent the shifting of the cross wire. That is, right angles to the arch where they cross. I am speaking of the crimp and arch in the Palmer screen.

The radius is made on the short crimp approximately two-thirds of the diameter of the wire. It depends upon the characteristic of the wire and the size of the mesh you are making and the size of wire used. The arch is as shallow as possible, and it is as long as possible, but still it must leave a convex side on the lower part of the arch for the cross wire to lay in to prevent it from shifting. That prevents it from shifting, because as soon as it starts to move in one direction or the other, it runs into the shallower part of the arch, or part of the wire that does not project up as high, and it meets resistance which forces it back into its natural position. I make the arch as shallow as possible to throw as much metal up on the abrasion side, or the wearing surface of the screen, as possible. The effect of that is that it prolongs the life of the screen. When these rods are woven into the screen, the relative position of [15] the crimps and the arches are that the arches are all on the—we will call it the up side, and the short crimps are on the opposite side. With regard to the characteristic of what I call the up side, or the arch side of the screen as to its flatness or roughness, the top side of the screen is a relatively smooth surface and the opposite would be—or what we call the wrong side of the screen would be exceptionally rough.

(Testimony of Samuel H. Palmer.)

Plaintiffs' Exhibit 3 is a sample off of the screen manufactured under the Palmer patent by ourselves. It is taken from a screen manufactured by me under my patent. It illustrates the formation that I have been testifying to. Looking at it, here is our elongated arch on the top side, and on the opposite side is the shorter crimp which holds this right angle wire in place, and the high part of the arch holds the next one to it, which throws all these arch crimps on relatively the same plane, as you can see by looking down on top of it. The opposite side is rougher.

Plaintiffs' Exhibit 4 is a Palmer patent which we manufacture. I think it is a five-eighths opening. It is a Palmer screen. It is another example of my screen that I have made for illustrative purposes.

Plaintiffs' Exhibit 6 is manufactured off of the Palmer patent, and it is one that is what we call wore out, and you can see that the arch still remains on the bottom side, and the meshes are pretty rigid, but there isn't much metal left. When I spoke of the underside of the arch, I was speaking of the underside of that portion of the wire which is elevated into an arch. The underside of the arch is still intact and holds its shape. The top part is wore off from the aggregate. In speaking of the underside of the arch, I wanted to draw attention that the arch still remains in the wire as far as all practical purposes is [16] concerned. With re-

(Testimony of Samuel H. Palmer.)

gard to the relationship between the crimps to which I have testified and the underside of the arch, the underside of the arch is the distance between the short crimps. It has two sides, top and bottom. I am speaking of the bottom part of the arch. That is not the same thing as the crimp. The underside of this arch is between the two short crimps.

In answer to questions by Mr. Catlett, the witness testified:

Plaintiffs' Exhibit 6 came off of the Pacific Building Material Supply Company. We got it from one of our customers. The Pacific Building Material Supply Company of Portland. We got it about three months ago. I am able to identify it as one of the Palmer screens by the way it is manufactured, by the arch underneath, and we also identify it—they have used no other screen, to my knowledge.

(Plaintiffs' Exhibits 3, 4 and 6 received in evidence.)

In answer to questions by Mr. LeSourd, the witness testified:

The difference between the screen made under my invention and the Potter screen is that the Potter screen is made perfectly flat and ours has a slight arch in it which prevents the shifting of the wires or mesh distortion. In making this state-

(Testimony of Samuel H. Palmer.)

ment I am referring to the top side of the screen. With regard to the same side of the screen, I say that the Potter is perfectly flat, and mine has a slight arch which prevents distortion. With regard to the difference in the crimp between the two screens, we make our crimps a little longer on account of using a higher abrasive steel, or higher carbon, harder wire. It is not possible to use the higher wire in the Potter screen, higher carbon wire, without changing it some. That is because the crimps are too abrupt, too sharp. That has a tendency to fracture the wire in the fabricating.

Referring to Plaintiffs' Exhibit 4, which is a small [17] scale of the Palmer-type screen, and Plaintiffs' Exhibit 5 which is a small scale of the Potter-type screen, an example of what happens to the screens under use is that in the Palmer screen, Plaintiffs' Exhibit 4, this arch here crosses this wire right in the center of it and when the pressure is applied here, you can't shift it. It won't shift. It keeps its mesh. I am trying to distort that screen with a pair of pliers and as I demonstrate I cannot make the screen shift. It has the same pressure put on it when it is in operation going like that with the rocks in it, vibrating with the weight on it. Plaintiffs' Exhibit 5 has no arch in it and is the Potter patent, and you can put it on here and you have distortion and you can't get away from it. I squeeze it with the pliers not near as hard as I did the other one with not

(Testimony of Samuel H. Palmer.)

as much pressure, and this screen is distorted. I am speaking of Plaintiffs' Exhibit 5. These two screens, Plaintiffs' Exhibits 4 and 5, are made of the same size wire and the same alloy, we will call it. They have the same characteristic of wire and are of the same opening.

I am familiar with the Galloway patent, a copy of which is introduced as Plaintiffs' Exhibit 11. The formation of the wire in that patent consists of very short crimps. There is three of them to every two meshes, and in order to do that it would have to be a softer wire than what we use in the Palmer patent. In this Galloway screen, there is a little difference on the two sides, not a great deal. One side is flatter than the other. On the flatter side the rod is crimped in such a way that it has three bumps, we will call it, to two meshes, and those crimps are crimped on the radius of the wire of the size used in the screen. The difference between that screen and the screen made in accordance with my patent is that we have eliminated two of those bumps in the two meshes and replaced it with the [18] elongated arch. The elongated arch I am speaking of takes the place of that portion of the wire in the Galloway screen that has three bumps in it. There is a disadvantage to the Galloway screen. It seems here, too, that this Galloway screen has another feature to it that we haven't talked about. The cross wires are crimped as an ordinary double-crimped screen. This screen is

(Testimony of Samuel H. Palmer.)

made up of two sets of rods. They are not formed identically, not according to this cut, they are not. The cut I am speaking of now is Exhibit 11, which is the Galloway screen. I am speaking of figure 3 on that exhibit. It shows that the extra crimp which would either be the warp or the shot wire, there is no way of telling here, and in Figure 6—well, I'll tell you, he has got two different types on one sheet. There are two types here on one patent. One type has two sets of rods with the three bumps, and the other type has one set of rods with three bumps and one set with one bump or crimp. I would presume that in each of the screens shown on the Galloway patent the wire with the three bumps is on the wearing side or the top of the screen. That would be the flatter side. The three bumps are on the flatter side of the screen. I presume the flatter side would be used for ordinary work because it would give you a little more metal. It would prolong the life of the screen by having more metal to grind away. The comparison between my screen and this Galloway screen is that we have eliminated two of those bumps and replaced it with a slight arch. In the Palmer screen there is a slight arch in place of the part of the wire that has the three bumps. There is a disadvantage to those three bumps. You have three protrusions there that is higher than the—which would take the wear off rapidly and shorten the life of the screen. That is not true of the screen made under

(Testimony of Samuel H. Palmer.)

the Palmer patent. We only have one long hump there and the wearing surface increases until the screen is wore more than half way through. I wouldn't think it possible to make the screen under the disclosures of the Galloway patent with high carbon wire because you have too abrupt crimps which would have a tendency to fracture the wire. When I say "too abrupt crimps," I am referring not to the number of crimps but the sharpness of the crimp.

In order to get a clear picture of the manufacture of the Palmer screen, it is necessary to understand that it has to go through two distinct operations, and one is the preforming of the wire, which is the placing of the crimps and arches in the proper shape and distance apart which determines the size of the mesh you are about to make. After this preforming operation, you put the rods into the loom and weave them together with cross rods, the same as you would ordinary cloth or basket weave. The rod is shaped, the first of the two processes, by running it through a crimper. That crimper can be either a gear crimper or it can be a press crimper, and those crimps in order to make a perfect screen must be precise. They must be exact. They must be exact throughout the screen, the individual screen that you are making. I am speaking of the forming of the crimps and the arches. They must be all alike. They must be exact with relationship to each other. There is two

(Testimony of Samuel H. Palmer.)

sets, there is the long way of the screen which we call the warp, and the cross ones, which are at right angles to the warp, woven in over and under. When I say they must be exact, I am referring to the fact that in the preforming if you preform your crimp correctly, your screen will come out straight. If you don't preform them exact, by the time you get to the end of the screen, your mesh is all distorted. It is all sixes and sevens, in other words. When I speak of exact, I am referring to the length and the depth of the crimps and the arches. They must be the same. The curvature must be the same [20] to make a perfect job. The curvature must be the same as compared to each other.

In answer to questions by the Court, the witness testified:

We use dies to determine the curvature of the arches. They are pressed, either pressed through a roll or through a plunger punch press.

In answer to questions by Mr. LeSourd, the witness testified:

When these rods or wires are put into the die or crimp, they are cold. It is possible to press them hot, but there is a big advantage not to, for the simple reason that it don't cost so much. If you had to heat all that wire it would be prohibitive in cost because you would anneal it, wove it, and then you would have to retemper it. We control the exactness in length and depth and curvature

(Testimony of Samuel H. Palmer.)

of the crimps and arches in this manner: The mechanic who sets up the machine, he has to set that according to his own judgment for each screen that he is going to make. Once he finds his right crimp, he runs out a few wires, say five, and then he weaves them together by hand and then he tests them for spring, density and accuracy and spacing. When he finds he has his machine set correctly, he locks his machine in that position and runs out the wire rods for his particular order without changing that machine. If he changed that machine, the screen would be ruined in between. With regard to what it is inside of that machine that requires this wire to take an exact shape, the punch press is—if you are using the press type, which is mostly used on this type of construction, it consists of a slide and a crank and a connecting rod. The connecting rod connects the slide to this crank, and the punch part is put into this slide, and the die is held solid in the block. As the crank turns over, the slide goes forward or back or up and down, whichever position your punch press is in, and the depth of that crimp [21] is regulated by lengthening or shortening this connecting rod, which is adjustable. The shape of the arch is controlled the same way, done through a progressive way. That is one way you can do it. For different sizes of wire we have a little different procedure in that crimping. The main thing is to get the results. You can regulate that arch with just a stripper

(Testimony of Samuel H. Palmer.)

plate, or some of the finer ones you put in two crimps at a time, and you have your teeth so set that when you come down, you make two short crimps. An arch forms automatically in between. If you don't understand what a stripper plate is, I might explain that.

By adjusting the dies and the stripper plate and the other elements of that machine, you can control the shape of the arch and the crimp. You can either do that in your die or you can do it in the adjustment of the machine. By the machine, I mean the crimper which can be a punch press or a gear crimper which has a set of rolls on it. If you pressed a crimp into a wire cold, as I have stated, and didn't control the two ends of the wire into which you pressed the crimp, you would probably make a staple, or pretty near. A staple is U-shape. It would form up in a U if you don't hold it down. In other words the two ends of the wire would go straight up in the air. The stripper plate holds that from raising up, or that can be built into the die. In other words, you must control those two ends in order to get any kind of a straight wire. In that control you can regulate that control so as to determine whether the wire between these crimps is flat or is arched. That must be controlled.

After my development of this screen, the Palmer screen, I commenced right away to manufacture and sell screens made in accordance with my invention.

(Testimony of Samuel H. Palmer.)

I have been manufacturing and selling them ever since that time. The territory that we cover in [22] our actual sales is pretty hard to tell because we sell so much through dealers. We don't know just where it goes to but we do know we have shipped some to the old country. There is India and South America, Cuba. Our main outlet is the northwest territory. I first began to make screens under the principles of the Palmer patent in the latter part of August in 1932 when we got to it. We got it perfected, I would say, along about the middle of 1933. The business in the manufacturing of screens under the Palmer patent has been very good and very remunerative. We manufacture the screens made under the Palmer patent in mesh or wire sizes from $7/16$ th opening up to 6 inches or whatever the demand is. [23]

The size wire that is used is from a $5/32$ to one inch. I am speaking of the diameter of the wire. Sizes $5/32$ to one inch inclusive. There isn't much difference in demand between the sizes. It is pretty well spread out. In tonnage I would say it would be about an inch and a half opening and larger.

In answer to questions by the court, the witness testified:

There really isn't any size mesh used more than other mesh sizes. The largest mesh like we make out of the inch rod there isn't so much of those. The smallest screen we have made so far is the $7/16$ opening with this particular weave. That is the mesh. The largest is six inches.

(Testimony of Samuel H. Palmer.)

In answer to questions by Mr. LeSourd, the witness testified:

When I say 7/16 opening, the opening is different than mesh. Technically speaking, the mesh is from center to center of your wire. The opening is the distance between the wires, the clear space opening. When I say 7/16 I am referring to opening.

Ninety per cent of these screens are made on order. There has been nothing standardized but you can put a reasonable stock in, lay up a reasonable stock. The sizes asked by the customers vary considerably. It is not only in the size of the opening, but our biggest difficulty comes in the dimensions of the screen itself to fit the individual equipment that the customer is operating. That necessitates screens of a large assortment of sizes. Screens made in accordance with my Palmer patent are used in industries other than the gravel industry. They are used in mining, screening ore, and they are also used in the pulp mills, screening chips and sawdust.

I have sold screens manufactured by me in accordance with the Palmer patent to Mr. Kaye. I think it was from 1932—I know it ended in 1944. Mr. Kaye sold these screens to his [24] customers. That ended in 1944. After that he made them himself, I guess. He got tooled up and made them himself. I have found screens made by Mr. Kaye that I felt infringed my patent. I wouldn't know

(Testimony of Samuel H. Palmer.)

how many of such screens I have seen, but I have seen them out at the different gravel pits and customers, and I have also seen them in shipment, en route. I have seen one batch, made a pretty good truck load. I knew they were Mr. Kaye's screens because the bill of lading came from his place and they had his shipping tag on them. We have seen screens made by Mr. Kaye off and on ever since I went in business down there. Prior to 1944 he got them from us but he didn't buy them all I found out later.

In answer to questions from the Court, the witness testified:

These were flint screens. He bought some from us and then he made some.

In answer to questions by Mr. LeSourd, the witness testified:

That was prior to 1944. After 1944 he made them all that he sold in the flat top that I know of. There are screens that have been introduced in evidence here that is the same as the screens of Mr. Kaye that I have seen and believe infringe my patent. One is Defendant's Exhibit A-23. Another is Plaintiffs' Exhibit 2. Another is Defendant's Exhibit A-26. Another is Defendant's Exhibit A-24. Another is Defendant's Exhibit A-21. Another is Defendant's Exhibit A-25. Without measuring them, I would say that is about all. They are samples, you know, they are pretty small to determine. The screens I have seen in the various gravel pits

(Testimony of Samuel H. Palmer.)

and other places concerning which I have testified, the screens of Mr. Kaye, are similar in construction to the screens that I have just pointed out with respect to their infringement of my patent. That would show up a little plainer if you had a larger screen because they are so [25] short there they don't have a chance to form to their respective shapes. All the ones I have inspected in the field have that arch in them like No. 2. Some of them are a little more, some of them a little less. It depends on the openings. With regard to what the defendants have called the screens that I have testified are similar to Plaintiffs' Exhibit 2, he started out calling them flat top. I don't know what he is calling them now. He might put on that—he had 4-S on it also. Flat top, 4-S.

I have notified the defendants that they were infringing my patent in my opinion. I went over to Mr. Kaye's office in April, 1948, on the 20th. I was over there that day, if I remember right, I gave him an order for some wire cloth that he was making for us, or increased it, but I asked him if he didn't think our patent was worth anything, and he said he thought it was. Well, I says, "You are making there a screen just like ours," and he says, "No." It was like ours, but he said he wasn't putting no arch in it, that just fell into it, and I told him it didn't make any difference how he made it, that he still had the same result. I told him our screen was made up of a combination of

(Testimony of Samuel H. Palmer.)

short crimp and the arch, and he told me at that time that he would consult a patent attorney and give him his opinion. I received a letter from him. Plaintiffs' Exhibit 15 is the letter I received from Mr. Kaye.

The screens of Mr. Kaye's that I believe infringe my patent are made of high carbon, hard drawn wire. Plaintiffs' Exhibit 2 contains high carbon, hard drawn wire.

In answer to questions by the Court, the witness testified:

By hard drawn I mean the temper is drawn into it and not put in with a heat treatment. It makes a spring wire that way. Exhibit 2 is made of a high carbon, hard drawn wire. I claim that hard metal and hard drawn metal are inherent characteristics [26] of the process of manufacturing screens under the principles of the Palmer patent in this way, that it is possible to use a high carbon, hard drawn in the process. We ordinarily use the high carbon, hard drawn. Of the other essential characteristics of the patented process under the Palmer patent, the next is in the crimping, the crimping and the arching, the combination of the short crimp and the slight arch.

In answer to questions by Mr. LeSourd, the witness testified:

At the time I developed my screen it was a problem in the industry of how to make a screen so as

(Testimony of Samuel H. Palmer.)

to use high carbon and that is one of the reasons that led us to do this, to figure it out. It is a part of my invention that I am able to use spring steel high carbon wire in the screen. It is possible to use a higher carbon wire in the construction of our screen due to the fact that we do not have to put such severe crimps in it. When I say higher carbon I mean higher than you can use in an ordinary screen, the Galloway screen or the Potter screen, or a double crimp screen in the same openings. You have to compare the same openings.

In answer to a question by the Court, the witness testified:

With regard to whether a short crimp is less severe than a long crimp, to clear that up, by making the elongated arch in there, you do not have to make your short crimp so sharp. In other words, the crimp that is put into the short crimp, the depth of it and the arch combined, must be a trifle less than the diameter of the wire that it crosses. If you add some of this to the arch, you can deduct it from your short crimp, which would make it less severe.

In answer to question by Mr. LeSourd, the witness testified:

The deeper and sharper you make the crimp, that means it is more severe on the wire the more you punch it. A more gradual [27] crimp wouldn't have a tendency to separate the grain in the wire

(Testimony of Samuel H. Palmer.)

as much as a short crimp, more of a gradual crimp. The sharp crimp would be the more severe, on the wire. By sharp, I mean the deep, sudden crimp.

Cross-Examination

On cross-examination the witness, Samuel H. Palmer, testified, in answer to questions by Mr. Catlett:

With regard to whether crimps were a new thing in the art in 1932, I would say "yes" and "no." It depends upon where they are placed. Crimps were known to the art long before 1932, wire was always crimped when it was woven. Arches were not known to the art before 1932 to my knowledge. I had never seen the arch in screens of any type, not the ones we are referring to. With regard to double crimp screens I wouldn't call that an arch. That which I would call an arch has more radius to it, more elongated, I mean. With regard to whether it is still an arch whether it is elongated or short, you can call it that if you want. If you want to call it an arch, go ahead. We'll say they have arches in there.

The depth of your crimp depends upon the size of your wire. The line of demarcation between the low carbon and high carbon content wire is around 35. carbon, but we use 45. in the wire game. 45. wire, that is 45 units of one per cent. I mean less than 35. is low carbon. I can't answer as to how high a carbon content of wire they use in mak-

(Testimony of Samuel H. Palmer.)

ing Potter screens, but I can answer you the tensile strength. They can't use over 180,000 pounds tensile strength in it. I know how high a carbon content wire they can use in making the Potter screens. I would say 45., that is in a hard drawn. If you are going to talk about annealed, you can use probably 100. When you ask what content wire, how high carbon content wire they do use in the Potter [28] patent, I don't know who you mean by they. All I know is what we can do to it. We can use up to 45. hard drawn. We are not making the Potter patent any more. Roebling's are making it. They are using less carbon content than we are. They call it high carbon content wire.

In the Galloway patent the carbon content wire they are using, some of them go up as high as 45., very seldom higher. I know that of my own knowledge. Roebling is making it under the Galloway patent right now. Also the Standard Fence Company, Cyclone Fence Company. We make a little once in awhile. Manganese Steel is making under the Potter patent, too. They are also making under the Galloway. I think you will find the Twin City Iron Works in Minneapolis doing it, too. When you ask how large manufacturers are Roebling's, I don't know what you mean by bigness. They are much larger than we are. Manganese Steel are larger than we are. Ludlow-Saylor are pretty good sized. They started to make a flat top, too. I don't know whether it is under the Potter patent

(Testimony of Samuel H. Palmer.)

—the Potter patent is out now, I guess. I do not think it is in accordance with the Potter patent. I think they are putting a lock notch in there like Roebling is. All of those concerns are using this high carbon content wire now, yes.

I have sold the half interest in my patent to my partner. The only transfer I made of it was in our bill of sale or in our partnership agreement. There is a sale in writing.

I have bought wire cloth from the defendant for a considerable period of time. As far as I know the double crimp screen has been known and manufactured for over 100 years. I think it was used in window guards and wire partitions, wire fences, and that sort of thing. The double crimp screen is very efficient. Referring to Plaintiffs' Exhibit 8 the part between [29] the indentations we call crimps. With regard to the part of the wire between the low point on the bottom, you can call it a short arch. We would call our screen an improved double crimp. Our screen is not a flat top type. I don't want to stick my neck out for that. It is poor. It is too flush. It is not as efficient as our screen, the flat top. I say our screen is practically flat on top, relatively flat but it is also rough, too.

With regard to the characterization of our crimp, it is a short crimp. We have a short crimp and it alternates with an elongated arch and then it continues with another short crimp and then another

(Testimony of Samuel H. Palmer.)

elongated arch. The arch is longer than the crimp. That is the difference. It is the combination of the two. That is what I claim to be the patentable thing in my device. One without the other wouldn't be any advantage. With regard to whether both were known long before, both the crimp and the arch, I never seen one before, never saw a screen like we are making. With regard to whether I now claim that it is a combination of the two that makes my device patentable, yes. It has been in the dictionary. I mean by that you got another question in there. You said the crimp and arch were known before, and I said it is in the dictionary. When I said the crimp and arch were known before, I am talking about the words.

I say that the Potter patent has a perfectly flat surface on one side. According to his patent it must be flat. The wire is straight and being straight, it is a perfectly flat surface, I would say, on one side. It has a right and wrong side to it the same as the other screens. The drawings on the first sheet of the Potter patent, Figure 1 in Plaintiffs' Exhibit 10, illustrate the appearance of the wire in the Potter patent. The wire [30] itself is not perfectly flat and I wouldn't say that it was. I would characterize those crimps in the Potter patent as having a sharp crimp at the intersection of every other wire. With regard to the significance of the word "sharp," it laps around—the inside of the crimp, the radius of the diameter of the wire, and it is brought up to a plane equal

(Testimony of Samuel H. Palmer.)

to the diameter of the wire that is woven across. The difference between the Potter patent and mine in that respect is that between those crimps I have a slight arch which enables me to make my crimp a little less deep than the Potter crimp. The Potter crimp is a sharper crimp than mine. The bottom part is round, but where they break off—it is the underneath part there where it is sharp. It is pretty sharp. The sharpness is at the bottom of the crimp where the wire breaks off to the level of the top of the screen. I mean the under side. It almost has a right angle bend there. That isn't the wearing side, but you realize when you bend a wire that sharp, that it must stretch the upper part of it, and a high carbon wire won't stretch.

My definition of the flat top type of screen is a screen that has a perfectly flat surface on one side. For example, like the Potter patent, it has a perfectly flat—you can put a ruler on there and there is no crimps projecting above the plane of the screen. The crimps are all eliminated. There is absolutely no roughness, no humps, no arch. A flat top screen is one where crimps are all on the opposite side, the lower side. The Potter screen is a long wearing screen because there is more metal there to wear, but in comparison with other screens using the same grade of wire, it is a long wearing screen. My screen is better than the Potter patent because my shallow arch gives a little indentation for the transverse wire to rest in. That principle

(Testimony of Samuel H. Palmer.)

was not well known in the art before that time. With [31] regard to whether there is a small indentation in the Galloway patent which supports the transverse wire, the Galloway patent shows a short crimp on both sides of the wire, if you notice, supporting the transverse wire on both sides. That is shown in Figures 2 and 3 of the Galloway patent. Figure 6 is a double crimp patent looking at the end of it. The principle of support for the transverse wire by means of indentation on both sides is shown in the Galloway patent.

The method of manufacture of a screen can determine whether or not the screen is a tight screen or a loose screen. Using my patent, a manufacturer could manufacture a loose screen or an ornament, but not for use. He could manufacture a screen that would shift but it wouldn't be any good. You can't manufacture a tight screen with a Potter patent because you bend the opposite wire. You will bend it and your wires will run out. In other words, one wire paralleling the other will gain or lose and you will have a distortion of the mesh if your crimp—if you crimp your wire too deep, you have got a loose screen; and if you crimp it too tight, you will have one that will run out, so you got to crimp it just right and that takes a mechanic to decide that when he sets the machine. That is the operator's job. It is possible to do it either way. A small sample of a screen is likely to be looser than it is with a complete screen. That

(Testimony of Samuel H. Palmer.)

is one reason why it's hard to tell from your samples down there. They are too small. My sample is a part of a screen. It is all right. I did not make it for that purpose. I do not claim that the defendant manufactures any of its smaller type screens such as my small sample. I haven't seen anything smaller than an inch and a half opening. As to the types of screens we make, we make the high carbon screen, we make low carbon, we make double crimp. I couldn't count the different openings for [32] you because we start out with a 7/16 in this particular weave and we can make it on any fraction of an inch and on out to six inches. That would be all of forty or fifty different types. We make them on the 32's.

With regard to Defendants' Exhibit A-24, I say, if that is manufactured by him, it is infringing on our patent. I have seen screens manufactured by him similar to A-24. On A-24 there is an arch between the indentations right here. It is not only in one wire, it is in this one and this one. This being a longer opening, this arch is more gradual, but you can see those. There is an arch there and there is an arch on the longer wire. It is not perfectly flat. You can see daylight through it. My understanding of an arch is just so it isn't straight. That is in the sense that I am using it in connection with my patent. With regard to whether I can see a uniformly curved elongated arch in that wire, this arch is the same as this one, and so on

(Testimony of Samuel H. Palmer.)

through. You only got one and your sample is too small.

With regard to the size openings I actually saw manufactured by him, I saw inch and three-quarters, inch and a half, two inches, two and a quarter. I saw two and three-quarters. It looked like that. You see that arch? That spot right there? I refer to that as an arch, and when you weave it up you have got a better one. If that wire was straight, you wouldn't change it, but that wire isn't straight. It isn't complete. I insist that you have here an arch. The shorter the arch is the more abrupt they are. I have been referring to Defendants' Exhibit A-24.

The smaller one that you are taking is no good, it is incomplete. A piece of loom waste. It isn't punched down, so that it is straight. I saw wires that look something like that. They had more arch, though. It is true that the smaller you get the opening, of necessity you get more nearly like an arch, unless [33] you reduce your wire in proportion, and the larger your opening, the flatter you can make it. With regard to your question if you make it very small, unless you intentionally or in your die had something which keeps it flat, it will automatically arch, won't it, my answer is no. Here you have a stripper plate, up here, to hold this down and this is straight. This punch comes down and breaks over here. You got a contact here, you can see the tool marks. Then you come down like this, push this up here, and that makes your arch. You said you struck on your punch, all

(Testimony of Samuel H. Palmer.)

these arches will be the same. When you use one of those punch presses and the press comes down upon the wire, if you don't have something to hold the wire between flat, it will not automatically arch, it will make a staple out of it. If your ends are fastened, the two ends would come out this way. As to the part in between, the pressure here and the pressure there would arch it automatically as in the middle.

The two and a half inch is partially arched but it would be more if it was put down where it belongs. I wouldn't say that Exhibit A-9 is much of an arch because it isn't complete. It isn't crimped deep enough. It isn't straight. The wire is bowed. If you put your required arch in here your wire will be straight because you will bend it down, you see. I mean this wire isn't complete for the purpose of making a screen. When the transverse wire is put through it would make a very poor screen. It isn't formed sufficient. Weaving would have an effect on the contour of the wire between the crimps if it is tight enough. It would bend it down here over this other wire. Merely weaving it would help in turning it into an arch. With regard to Defendants' Exhibit A-22, a three inch by one-half, I didn't see anything like that. There isn't any arch shown there. It is flat. Defendants' Exhibit A-25 shows an arch. [34]

My understanding of the words in my patent "uniformly curved" is that it means that when you

(Testimony of Samuel H. Palmer.)

pre-form your wire, the curves and the crimp should be uniform to make—I conceive an arch as being a continuous curve. If a portion of that curve is eliminated, and it is flat, it couldn't be both, so therefore, if it was partially arched, it would be an arch. With regard to the drawing in my patent, Plaintiff's Exhibit 1, Figure 2, that shows a continuous, progressive curved arch. There is no flat portion shown in the cut. We state in here that the arch is just to be sufficient to keep the wire from shifting. It is described as uniformly curved elongated arch.

In answer to questions by the Court, the witness testified:

The largest mesh which up to this time I have manufactured under my patent is six inches, I believe, six inch opening, and then we use one inch bars for that. The distance between the two transverse crosswise wires that cross at right angles to the arch would be six inches between them, or the arch would extend from one wire over the other one to the center. It would be thirteen inches to be exact. In a mesh that large the arch may flatten out a little at the top. It can't be over a little flat, anyway, if it is that. I wouldn't think that in any way affects the validity of the claims under my patent that it involves an arch in principle. The arch, the combination of the short crimp and the arch, is what the patent really is. If you have a slight arch the wire runs into resistance and prevents it from distortion, according to experience.

(Testimony of Samuel H. Palmer.)

In answer to questions by Mr. Catlett, the witness testified:

I can prove that the shallow arch in my patent offers resistance to shifting with those two samples and a pair of pliers or I will let you have the pliers and you prove it. I have a very small sample there, but if you want to get me a pair [35] of tongs, I will do it on the others in proportion to pliers. As you eliminate the arch, you of course lessen any support that is given to the transverse wires but you are supposed to increase the size of your wire to make up for that for a larger opening. It has more effect. It is more noticeable. It is there just the same but it is more noticeable where you use a larger wire, if you will note the specifications.

With regard to examples of the Potter patent, I would say that that one there Mr. Kaye has furnished, I don't know the number of it, is very close to the Potter patent, if not it. With regard to whether if it is manufactured close to the Potter patent it doesn't infringe on mine, I didn't pick out that one. It is that middle one down there, the big one, the center one in the second row. It is Defendants' Exhibit A-22. It is very similar to the Potter patent if you take a look at this cross section. It doesn't infringe on mine. If you make them all like that it would be fine. It is not true that the larger types of screens Mr. Kaye makes do not infringe my patent because all I have seen in the

(Testimony of Samuel H. Palmer.)

field are not made like that. That is a sample. I doubt whether he made it. You can do it by setting your dies down.

With respect to the comparison between the Galloway patent and my patent, we have eliminated two bumps entirely and on that wearing side, I would say two will be sufficient. That will take care of it. We make our screens by forming them in a crimper to the proper form, and then we put them in the loom and weave them up, two operations, two distinct operations. I think everybody who manufactures has to do that, especially where you are using a hard wire. It has got to be preformed to the shape you are going to use it in. We make our crimps, on the large one, we make them in a crimper, one crimp at a time [36] and in the small ones we make two, three and four crimps at a time. We secure our arches with our die. Our die is properly made so that they are all uniform. Without bringing a press up here, it is pretty hard to explain to you how I form those arches. You have a set of dies cut out to the shape of the crimp you want for the female part of the die, and the male part of the die is cut out to fit that part. When it comes down, it presses the metal in between to the proper shape. I intentionally and consciously and artificially produce my arches. I do that with the die. We make our dies accordingly. The die is made of a piece of steel and it is carved out just right, so that when the

(Testimony of Samuel H. Palmer.)

wire passes through, the punch comes into the die and forms the wire, and we also have what we call a progressive die, where we straighten the wire and form it at the same time. On some we straighten the wire first before we start any operation. We have progressive dies on most of our stuff that does the straightening as it forms it. On some of them we punch the crimp and on some we run it through a gear crimper, a set of rolls with teeth properly spaced on these rolls. As they unfold the wire rolls through them and presses the crimp in there. Both methods produce the elongated curved arch if you make them right. You can make them both ways. The arch is put there by me intentionally. That is part of the patent. We put the arch in artificially. We do it with our die or rolls, it depends on what we are making. We are making and shaping the wire so that we can make a mesh. We run it through the rolls to give it its proper shape and if it is a larger wire, we run it through a punch press.

I am not familiar with the way in which Mr. Kaye makes his, but I can tell by the tool marks about how they are made. There is nothing elaborate about it, no. That is what I refer [37] to as the press type, when we punch two at a time on those smaller ones, like inch and a half and smaller, the arch forms in there from the pressure from the male die. If you have a press type the arch is naturally formed when you make the crimp, if you

(Testimony of Samuel H. Palmer.)

get it there and regulate the depth of that arch by your stripper plate. That must be—you can flatten it, you have got to have it straight. You can't have one arch way deep and the next one shallow. If you did you would have a very poor screen, wouldn't even stay together long enough to get it on the job. Whether, if you don't flatten it, you will have a natural arch depends on how you are running your wire off the reel. You wouldn't get a natural arch like he has in the No. 2 screen, because that there is about an eighth of an inch diameter. That is bent on an eighth of an inch radius, not greater than an eighth of an inch radius. You won't get a natural arch when you put in two crimps side by side unless it is pressed in. I would call a natural arch, if you took a coil of wire off a bundle and laid it down, but a 26-inch coil won't make an arch like that. When you press crimps in it it has the effect of making an arch between the crimps. That is part of your die.

Our screens are not sold by the ton. We sell them by the piece. The price depends on what kind of work we do on them. We have sold on a square foot basis, base price, and some of them have more work than others and formed arches. We have to charge extra for that.

In answer to questions by the Court, the witness stated:

We have fourteen employees, that includes the office girl. One person works in the office. I have

(Testimony of Samuel H. Palmer.)

a secretary and a sales manager, and my partner is assistant manager. He takes care of it when I am not there. Then we have a shop superintendent. I don't know the volume of our business in screens annually. [38] I don't know whether I want to tell that at this time or not. Do I have to tell it? I can give it to you in this way. Back in 1932, I kept a pretty accurate check on what screens was used in the territory, and thirty or forty thousand pounds would have done the deal, furnished it, and last year I would say it is 500 tons used. I have objection to saying how much quantity I produced, but I will swap with them. We have made 212 tons last year, 212 tons of screens. I don't wish to translate that into a dollar amount. We make other types of goods besides screens. We make some wire works, wire guards, wire partitions for school houses, a little jail work now and then.

You can use a high carbon manganese steel wire in a double crimp if it is annealed. We use a different wire for our double crimp than we do for our flat top. If you want to know, we use around a 200,000 pound test wire for our Flint screens, one made according to our patent, and around one hundred forty to sixty thousand pounds where we crimp it. That means the hardness of the wire, that is the tensile strength, per square inch, that determines the hardness. You can use the other wire in manganese on a large opening, but I mean

(Testimony of Samuel H. Palmer.)

by that a large opening in comparison with the size of the wire you use.

Redirect Examination

On redirect examination, the witness, Samuel H. Palmer, testified in answer to questions by Mr. LeSourd:

The words "spring steel" found in my patent at several points means a high carbon wire that is hard drawn. The temper is drawn into it. The drawing in of the temper is something distinct from the carbon content of the wire but it would be impossible to make a hard drawn wire that didn't fracture without a high carbon content. In testifying concerning the use by Roebling of a high carbon wire, that is a hard drawn wire, all [39] that we ever received from them has been a hard drawn wire. They make both, I believe. According to their advertising matter, that is used in manufacturing a screen according to the Potter patent. I have never seen one of Roebling's manufacture, but according to their catalog, they started making that screen similar to the Potter patent in 1947. I wouldn't want to say exactly how high a carbon content they use, but I would say it is around a 35. I do not know how hard drawn that wire would be, but I do know that it is softer than ours, what we use, for the simple reason we have some finer mesh we purchased from Roebling which was supposed to be a high carbon steel and it was a

(Testimony of Samuel H. Palmer.)

good deal softer than what we normally use in our screens or the fine mesh that we purchased from Mr. Kaye.

In answer to questions by the Court, the witness testified:

The expression 45. means 45 units of one per cent in volume of the metal is carbon. 45 units of one per cent rather than 45%. That's a little less than one half of one per cent is carbon.

In answer to questions by Mr. LeSourd, the witness testified:

When I used the words "arch" and "crimp" in my testimony, I aimed to use them pertaining to our patent in describing the construction or the forming of the wire that is used in our patent. We use a short crimp and alternate with a long crimp or arch on the opposite side of where the short crimps are and those alternate throughout the length of the wire. It would have been possible to use words such as bend and other words to describe this type of structure in the wire. A short bend and a long bend could be used, but I saw fit to use the word, crimp and arch, in describing it.

In answer to questions by the Court, the witness testified:

I am afraid I don't understand mathematical formulas [40] relating to angles or geometric equations that state angles in relation to certain lines. You couldn't mathematically state the difference

(Testimony of Samuel H. Palmer.)

between a crimp and an arch because it changes in relation to the size of the wire and the opening that you are using. As to whether one could use reference to the size of the angle made between a base line and the outer line of the arch or crimp as distinguishing between the arch and crimp, expressing the angle in degrees, that the angle characteristically is larger in the case of a crimp than it would be in the case of the arch, and that as you begin to approach may be a 45 degree angle, the angle would tend to be that of a crimp, and as the angle diminished in size it would approach the typical size of an angle between the arch and the base line, that would be so on a particular size opening. You could figure it out that way.

In answer to questions by Mr. LeSourd, the witness testified:

In my testimony in using the word crimp I have reference to the short one of the two curvatures shown in the diagram of my patent, Plaintiff's Exhibit 1, Figure 2, which shows a curvature in one direction of the wire with a relatively short radius and the curvature of the same wire in the other direction with a relatively long radius. The arch would be the bend from the beginning of one short crimp to the other. The crimp is used to describe the bend that has a short radius and the word arch is used to describe the bend that has a long radius. In the double crimp screen concerning which I have testified, the radius of the curve in each direction

(Testimony of Samuel H. Palmer.)

would be the same. My invention is distinguishable from the double crimp in that feature.

In the Potter patent one side of the wire is perfectly flat. The part in Figure 1 marked B is the bottom of the short crimp. That is a curve. It differs in principle from my curve in that this one here has a radius of one and one half times the wire [41] from the outside and ours has about two thirds. Our short crimp is just about half as abrupt as it is in the Potter patent and the bar is taken out. It is barred by that slight arch. The curve there in the Potter patent is a crimp. It is all crimped. In other words, all the bends in there are crimped. Between the curves in the wire of the Potter patent, the character of the wire is a straight plane, straight wire. There was not known in the prior state of the art, prior to my invention, a combination of a short radius curve which I have described with the word, crimp, and a long radius curve which I have described with the word, arch.

With regard to the support of the transverse wire in the Galloway patent, it has extra dents there, or what we would call an extra crimp. The Galloway patent has an inside radius of the crimp equal to half the diameter of the wire. That is being used in the same screen and in the Palmer patent we have about less than three quarters of the diameter of the same wire radius. The radius is less than three quarters of the diameter and that varies. I am talking about the crimp in the Palmer patent. The

(Testimony of Samuel H. Palmer.)

arch has a much greater radius, a much greater radius than in the Galloway patent. With regard to the purpose of the two side crimps of the long portion of the wire in Figure 3 of the Galloway patent, in other words, crimp No. 9 in that figure, I think it was the intent of the inventor to securely lock that crosswire that you can get the end view of in place. You can take crimp No. 6, that is the bottom crimp between 7 and 9. It is shoved down to throw more metal down below in order to lock that wire in position. I think that was the inventor's intention. That would take a rather soft wire to do that. When I said to lock that wire I am talking about the one with the cross wire, No. 8 on this diagram. No. 6 crimp had to be shoved up there in order [42] to get that indent to bring it down around No. 8, so the depressions between No. 6 and No. 7 were formed to lock No. 8 in place. Looking toward the top of Figure 3 to the two humps or crimps, or whatever you call them, No. 9, with wire No. 5 between them, I would say that these two crimps No. 9, these two humps, together with the depression No. 3, were probably formed to enclose wire No. 5. That particular screen is made exactly like our extra type screen only they have shallowed one crimp, shallowed every other crimp you might say. In comparison with the screen that we make, the Palmer patent, you could not use a spring steel wire, not make that satisfactory. We punch it too bad. It would fracture. If it didn't

(Testimony of Samuel H. Palmer.)

break in the fabricating, it would break down with fatigue in the vibrating machine in a very short time. In the Galloway patent they have used an extra crimp in order to prevent the transverse wire from shifting. In the Palmer patent, by using all higher carbon spring steel, we can hold that with an arch and eliminate those abrupt crimps which has a tendency to weaken the wire. Looking at Figure 3 of the Galloway patent and comparing it with the Palmer patent the arch in the Palmer patent extends in a relative position from No. 3 to No. 3 as those numbers are contained in Figure 3 of the Galloway patent. The corresponding numbers in Figure 2 of the Palmer patent may be identified as 7 and 7. In the Palmer patent, referring to Figure 2 thereof, the point which is marked No. 10 coincides in that screen with the point which is marked No. 3 in Figure 3 of the Galloway patent. Figure 7 on Figure 2 of the Palmer patent refers to the crosswire, the one that runs right angle to the one you are looking at. You are looking at the end of it. No. 7 is the transverse wire that runs at right angles. On Figure 2 of the Palmer patent there is a point which is not marked with a number but is similar in [43] position to No. 10 that is marked and it is directly under No. 7 on the far left side. The position of the arch between the No. 10 in Figure 2 of the Palmer patent and the point you have just described, which is equivalent to No. 10 on the far left side corresponds in general

(Testimony of Samuel H. Palmer.)

with the space in Figure 3 of the Galloway patent between the two No. 3's.

When I testified on cross-examination that the rod identified as Defendants' Exhibit A-13 was not completely manufactured, I meant that the press wasn't set down sufficient. The indentation is too shallow. There is something about the shape of this rod. The wire would come out straighter if it was pressed down where it should be in the dies. This rod is curved. It should be straight, fairly straight. In this form it could not be successfully woven to a screen. When I say it isn't straight I mean it has got a natural bow in it, from one end to the other. If that were fully pressed or manufactured and if you allowed this little arch to come in each one of these, it would straighten it out. The stripper was either too high or else the punch didn't come down far enough to properly form it. The same defects are present in Exhibit A-9.

In answer to questions by Mr. Catlett, the witness testified:

Referring to Exhibit A-9, if that were straightened out you would have too shallow a crimp to make a screen. Straightening it out would have no effect on the arches in its present form. Referring to A-13 which is slightly bowed, with regard to whether if it were straightened out that would have any material effect on the arch, that depends on how you straightened it. It shouldn't have if you straightened it out. If you straightened it in

(Testimony of Samuel H. Palmer.)

these crimps to get your curve out it wouldn't have any effect on the arches. You might also ask me to remake the screen.

In answer to questions by Mr. LeSourd, the witness testified:

When, with reference to these two exhibits I said as to A-9 that if you straightened it out it would have no effect on the arches, I was thinking of just making the wires straight. That wire could not be made into a screen satisfactorily because the crimps wouldn't be deep enough. The same thing is true of Defendants' Exhibit A-13. That would have to be woven up into a screen that size down there. You could see that wouldn't go into it.

In answer to questions by Mr. Catlett, the witness testified:

The importance, so far as the charcater of the arch is concerned, of my saying that it couldn't actually be used in the screen, is that it wouldn't hold its shape. It isn't properly crimped. That has an effect on the arches because this one here should have more arch here or more crimp here. It is broken down at this point. If you don't want to put the arch in there, make your short crimp—break it a little more. You would run into trouble if this were a straight wire with the same arches you have here.

(Testimony of Samuel H. Palmer.)

In answer to questions by Mr. LeSourd, the witness testified:

With regard to my testimony concerning the Galloway patent, that the arch in the Palmer patent in general covered the same position in the screen as would be covered in the Galloway Figure 3 from No. 3 to No. 3, the arch of the Palmer patent eliminates two humps of the Galloway patent and in most cases you would discount the third one, but I wouldn't know how much. I mean by discounting the third one it would be less abrupt, depending upon the size of the opening of the mesh.

Concerning the method of manufacturing these screens and the so-called natural arch, it is possible in making these screens to make an arch higher or lower by adjusting your die or rolls. Also it is possible by adjusting your die or rolls [45] to take the arch out altogether.

Recross-Examination

On recross-examination the witness, Samuel H. Palmer, testified in answer to questions by Mr. Catlett:

The hump in the center, No. 7 in Figure 3 of the Galloway patent, furnishes more support to the transverse wire, which is No. 8, than my patent. The arch which my patent contains has an advantage over that. My patent has an advantage over the Galloway because it has more wearing surface. I consider that an advantage in that it will last

(Testimony of Samuel H. Palmer.)

that much longer. The sharp little humps don't have so much surface and they cut off almost immediately. The one you can eliminate most of the humps on, naturally will last longer, because you have full diameter of the wire to work on. My type of screen in the Palmer patent wears out more quickly than the Potter patent type but it is much more efficient. I think my patent says something about a combination of a short radius curve or a long radius curve. My patent continually uses the phrase, "uniformly curved, elongated arches" and "gradually formed shallow crimps connecting the arches" also "gradual longitudinal arches." I presume these are the claims in my patent. There is such a thing as oil tempered spring steel wire. That is all the same as—it is the same analysis as the hard drawn wire that we are using. Oil tempered wire can be used also. It is heat treated or the temper is put in by heat treatment and the hard drawn is drawn into the wire, the temper is. I can use the oil tempered wire also. Hardness alone determines the wearing quality of the wire on a screen. Hardness is the biggest quality. You have got to have a little manganese with it and that naturally goes along with it. You don't see any high carbon wire without it. You can have a screen that is too hard. We do have defective wire sometimes. It gets [46] too hard. You have to reject it.

(Testimony of Samuel H. Palmer.)

Redirect Examination

On redirect examination the witness, Samuel H. Palmer, testified in answer to questions by Mr. LeSourd:

In actual use the life of a screen depends in some effect on bits of material getting in between the intersecting wires. Not exactly the life of the screen, but it cuts down the efficiency if they blind out. What we mean by blinding out, that a low carbon wire—rocks will stick into the mesh and blind the holes out, and the contractor makes his money with what goes through the holes, and not what passes over the top of the screen. By blinding the holes out I mean it closes up the screen. When rocks get in between the wires they do not affect the wearing of the wires so much, but they have a tendency to distort the mesh. That is why we use a high carbon wire, to prevent that as much as possible. There is a distinction between the Palmer screen and the Potter screen in that respect. That is one reason why we couldn't make the Potter screen and get away with it, the rocks would get in and wedge and distort the mesh. That was one of the reasons. That is not true of the Palmer screen if it is properly made. They can be made bad, too. I don't know that rocks would get in any more readily in the Potter screen than the Palmer screen, but when they get in there, they do more damage, because there is nothing there—there is no resistance there to hold the wire in place and it will

(Testimony of Samuel H. Palmer.)

shift out of shape, the same as I demonstrated with the pliers.

Concerning the smallness of the samples on which I have demonstrated the shifting, the reason I made those small samples is so you could do it with an ordinary pair of pliers. If you want to get me a pair of blacksmith tongs, I will shift all the flat ones with the straight wires. Under the pressures which [47] the screens have in actual use would be sufficient to cause shifting. It is the weight on them and the excessive vibrations, it will cause a mesh distortion if your screen is not properly made. If you make them too flat, you will get the trouble all the time.

(At 5:05 o'clock p.m., Tuesday, October 18, 1949, proceedings recessed until 10:00 o'clock a.m., Wednesday, October 19, 1949.)

October 19, 1949, 10:00 o'Clock A.M.

Recross-Examination

On recross-examination, the witness, Samuel H. Palmer, testified:

Mr. Kaye ceased to purchase from me in 1944 and started making screens himself. I saw his products at that time and was aware how they were made. I didn't notify Mr. Kaye that I thought he was infringing until 1948 because I didn't think he was going to cut much ice with us down there, but then he put a man in our territory and I thought we better stop him if possible. When I had Mr. Bowie

(Testimony of Samuel H. Palmer.)

get for me one of the screens manufactured by them, I instructed him to get an inch and a half screen. I believe that is one of the smallest Mr. Kaye makes. I instructed him to get a duplicate of something I believe was manufactured in 1947, prior to the time when I gave Mr. Kaye any notice. I have brought one of my screens of one and one half inch for comparison. I have brought one sample of our larger screens and that was worn down to show the difference. With the exception of a worn screen I haven't brought any of my larger screens to exhibit. I didn't think it would be necessary. They are all made on the same plan. I differ with you on whether as you extend the arch it flattens out necessarily and doesn't give any support [48] whatever to my transverse wires. That isn't the reason why I didn't bring any larger ones. I knew Mr. Kaye manufactured a considerable range of the larger sizes. As to why I didn't bring my larger sizes to compare with his, I just didn't do it. I can get one for you if you wish.

The double crimp, as I testified, preceded my patent. The double crimp is made by running it through a gear crimper. The wires or rods are run through a gear crimper and in most cases the warp wires are crimped shallower than the cross wires. They are woven together in a loom. I wouldn't say that there are three methods of making double crimp, three types of double crimps in the gravel screens, if that is all we are talking about. If we are going into the industrial spark

(Testimony of Samuel H. Palmer.)

arrester cloth, that is made of a wire with a double crimp, and that is crimped by the machine that is weaving it, and that wire is made for that particular purpose. I don't know what you mean by a regular double crimp, then your so-called extension crimp and then your high low crimp in the way they are described. The double crimp screen was always referred to as the over and under basket weave. We have a crimp which has an offset in it, which may be called a high low crimp. If the intermediate crimp is that what we would call the extra crimp, I know it. That is the same as the double crimp process only you leave out every other wire. You move it up and you have one extra crimp in between your two cross wires and it has the same—it don't have a right and wrong side to the screen. You have crimps, a short crimp. I don't know that you have arches also. They are about as sharp as a saw tooth, the teeth that make them. I wouldn't call it an arch.

Redirect Examination

On redirect examination the witness, Samuel H. Palmer, testified in answer to questions by Mr. LeSourd: [49]

Plaintiffs' Exhibit 20 is a partnership agreement between myself and Mr. White. It is the original. Mr. White is my—C. A. White is the one mentioned in this case with me, and he is my partner doing business as the Western Fence & Wire Works. He is the other plaintiff in this case. The partnership

(Testimony of Samuel H. Palmer.)

agreement contains reference to the patents that are here in controversy, the Palmer patents. The screen patents are mentioned in here in the partnership agreement and it is the only one that we have, and it is receipted in full, paid in full, so I would say that it is covered. That is the intent of it anyway. I own the patent. [50]

By the provisions of Paragraph 5 of the partnership agreement on page 2 and also the schedule attached to the document, page 2 of the schedule at the end of the document, I intended to transfer the patent rights which I have in this suit to the partnership. It is the same patent and it was transferred along with the other assets and as a part of the assets. On page 2 of the schedule in this agreement it describes flint screen patents. By that description my intention was to transfer the patents along with the other assets to this partnership, to transfer the patents that I held on manufacturing of Flint screens, or sold under the name of Flint screens, which was the Palmer patent. By Palmer patent, I mean the patent on which I am suing in this case, which is here identified as Plaintiffs' Exhibit 1.

(Plaintiffs' Exhibit 20 received in evidence.)

I have made no other transfer of my rights in this patent, Plaintiffs' Exhibit 1, other than by Plaintiffs' Exhibit 20.

(At this point, Samuel H. Palmer was excused.)

FRANK E. ESSLEY

called as a witness by and on behalf of plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination

In answer to questions by Mr. LeSourd, the witness testified:

My name is Frank E. Essley. My age is forty-nine. My residence is Portland, Oregon. My present occupation is sales manager for the Western Fence & Wire Works. My experience in the wire products industry has been that I started to work for [51] John A. Roebling's Sons Company of California, which is a branch of the parent company, John A. Roebling's Sons Company of Trenton, New Jersey, in 1920. I continued to work for John A. Roebling's until 1945, at which time I quit Roebling's and went to work for the Western Fence & Wire Works. I started out with John A. Roebling's Sons Company as a warehouseman for them in 1920 and worked in the warehouse for between four and five years. I was then transferred to the office as a stock clerk. I was stock clerk for some little time, I imagine about three years, and was made chief clerk, which position I held until 1941 when I became a salesman traveling on the road for them. In my work for Roebling as stock clerk and as chief clerk, I had occasion to become familiar with wire screens. Wire screens are one of the products manufactured and sold by Roebling. When

(Testimony of Frank E. Essley.)

I became a salesman for Roebling in 1941, I handled wire rope, insulated wire, copper wire, and woven wire fabrics which included sand and gravel screens. Referring to Plaintiffs' Exhibit 17, and particularly to the brown covered catalog which is marked with pencil on the cover, 1935, that was the complete catalog for the woven wire fabrics division of John A. Roebling's and this is the catalog that we used while I was salesman for that company. I was salesman for Roebling from 1941 through 1945, and I used this same catalog during that period. This catalog was also in use during the time prior to 1941 when I was chief clerk at Roebling's.

I was familiar with all of the products sold by Roebling in the woven wire screen division. If there was a new product come out and was for sale, we would immediately get a bulletin describing the product. I visited the Roebling factory for an educational—well, it was an educational trip. We were to see all the different products manufactured and to gain knowledge of all the products. I know whether or not this catalog, the brown covered catalog that we are referring to, contained all of the products put out by Roebling in the woven wire screen division during that period. The basis for my statement that I have such knowledge is that you will notice that this is a loose leaf catalog, and if there was any new product come out, we immediately got a bulletin on it and then a descriptive sheet to be inserted in this cata-

(Testimony of Frank E. Essley.)

log. I know that I got a descriptive sheet as to all their woven wire products because it was the general practice of Roebling's to distribute all of their material all over the United States. To the best of my knowledge, this catalog contains all of the woven wire products put out by Roebling during the period concerning which I am testifying.

I sold Roebling's products in the territory from Salem, Oregon, south to the California border, and from Prineville south to Lakeview, and from that line west to the coast. I sold and offered for sale all of the products listed in the brown covered catalog, Plaintiffs' Exhibit 17. That includes woven wire screens for use in the gravel industry.

In the course of my work as a salesman, I had occasion to visit the plants of users of such gravel screens. Every sand and gravel plant in the territory was a potential user of a number of products manufactured by Roebling, including wire rope, insulated wire fittings, and wire cloth. It was a part of my work to visit such plants, some of the plants were called upon regularly and some whenever I happened to be in the immediate or adjacent territory. In the course of that work I had occasion to observe gravel screens, classifier screens, in operation. While I was with Roebling's, Roebling sold gravel screens of the Western Fence & Wire, Flint screens. These screens were made under the Palmer patent, introduced here as Plaintiffs' Exhibit 1. Roebling purchased them from Western

(Testimony of Frank E. Essley.)

Fence & Wire Works on requisition. [53] Roebling purchased Palmer screens because in selling screens delivery is one of the big items and, the factory being so far away, it wasn't practical to order from Roebling's and wait three or four or five weeks for delivery. As a usual thing, when they want a screen they want it immediately, or within a day or two, and the service we got from the factory was such that we couldn't sell the Roebling screens, therefore we sold the Flint screens. We got very excellent service from the Flint screens, that is, the customers were well satisfied with them and we saw no reason for ordering the Roebling screens from Trenton. By Flint screens I mean the Palmer patent, in other words, a screen made in accordance with Plaintiffs' Exhibit 1 in this proceeding. The screens bought by Roebling from Western Fence & Wire were similar to Plaintiffs' Exhibit 3, which I have examined.

Most gravel screens are ordered on special order, very few carried in stock, owing to the changes of specifications on any job, any rock production job, and they don't know from one day to another as a usual thing whether the specifications are going to be changed. Sometimes they start out using one size screen and the inspectors will insist on them changing to either a larger or smaller opening.

Since I went with Western Fence & Wire, I have been connected with the screen division and have been selling and servicing screens all over the ter-

(Testimony of Frank E. Essley.)

ritory that we cover. In the course of my work with Roebling's and Western Fence & Wire, I have become familiar with the requirements of users of classifier screens. I have had occasion in my work with Western Fence & Wire to observe such screens in use. When I got into a rock production job or gravel plant, it is my practice to go up and inspect the screens, see how they are working, and see how the wear is on them, and make a general inspection of screens in use [54] and screens that have been used, in other words, worn out screens. I have visited hundreds of plants. Roebling got Palmer screens and sold them from 1936 to the present time. In the course of my experience with Roebling and Western Fence & Wire, I have had occasion to become familiar with the various types of gravel screens that are produced and used. I have become familiar with the various patents under which these gravel screens are made. I have become familiar with the advantages and disadvantages of each type of screen in actual use. I have seen other screens similar to Plaintiffs' Exhibit 2 in various plants in the northwest. These other screens were similar to Plaintiffs' Exhibit 2 in that they have the shallow crimp and arch as shown on this screen. I have seen screens which were marked as being the product of the defendants in this case in users' plants which were similar to Plaintiffs' Exhibit 2, and the similarity was as I have stated. I would say that I have seen several hundred screens of the defendants that were similar to this exhibit. They

(Testimony of Frank E. Essley.)

were not all of the same mesh and wire size, various sizes of wire and various size openings. I have seen these screens in plants in Oregon and Washington, Idaho, Montana. There is a demand for the Palmer type screen with the arch as disclosed in Plaintiffs' Exhibit 1. I have become familiar with how that screen acts in actual operation. It holds the meshes or the openings to a very close tolerance. The wires do not shift in the screen as in some of the other manufacturers, that is, of different types than the Palmer screen. The close tolerance is an important factor in the use of the screen because in the grading of aggregate, the inspectors hold the contractor to a very close tolerance, and this is set up by whichever—whether it is the city that they are doing the work for, the city or the state or the United States, they have their [55] specifications that state how much tolerance they will allow on the grading of the aggregate.

In the course of my work, I have had occasion to observe screens made under the Potter patent in operation. There was shifting of wires, and in fact, the contractor ceased using them although he had them on hand, and bought Flint screens. Our service was so much superior to theirs that they continued to use Flint screens throughout the life of the job. I am speaking of the Dorena Dam job located at Cottage Grove, Oregon, about 20 miles south of Eugene, Oregon. I have had occasion to become familiar with how the double crimp screen wears in actual use. The high points of the screen

(Testimony of Frank E. Essley.)

wear off very rapidly and they lose the tension between the wires. When those are worn off, the screen goes to pieces. On the average job, I would say that the screen made under the Palmer patent wears 50 to 100 per cent longer than the double crimp. Plaintiffs' Exhibit 7 is the type of screen to which I referred when I mentioned a screen made under the Potter patent, and Plaintiffs' Exhibit 8 is the type of screen to which I was referring when I mentioned the double crimp screen.

On Plaintiffs' Exhibit 2 there is one side of the screen that is normally used as the wearing surface in actual use. That is the side that the wires are arched on. This is the rough side. The smooth side is the wearing side which is normally used in the gravel industry for the wearing surface. The other side is the lower side, or the crimp side, the rough side. I would call the smooth side the upper side of the screen. The single wire of Exhibit 2 has crimps. The part I would call a crimp is the convex—no, the concave side. That part of the wire which is concave upwards toward the smooth part of the screen is the part I would call a crimp. The crimp, I would say, [56] would be about $\frac{1}{8}$ the circumference of the wire. I characterize that crimp as shallow because the crimp is not near the depth of the diameter of one of the wires. It is shallow with relationship to the diameter of the wire. The wire between the crimps is arched. It is a convex arch, convex upwards towards the

(Testimony of Frank E. Essley.)

smooth side. The arch starts where the concave crimp stops, and it is arched from that point across this wire and to the next crimp, to the concave portion of the next crimp.

In Plaintiffs' Exhibit No. 7, which has been identified as a Potter type screen, the shape of a wire is flat with a cup in the different intervals for the wires that intersect. The cups are all in the same direction. The cups are the same depth as the diameter of the wire, making a smooth surface or a smooth plane across the whole screen. Referring to the points on Plaintiffs' Exhibit 7 where the wire departs from a straight line and drops into what I have designated as a cup, and then again to the point where the wire again commences a straight line on the other side of the same cup, the relationship of those two points with the top of the intersecting wire that rests within the cup is that they are on a straight plane. The wire itself, I would say, would be level, straight across. The two points that I mentioned, at the top of each side of the cup, are the same height as the top of the intersecting wire that rests in the cup. The sides of the cup rise steeply, almost directly up, to this point level with the top of the intersecting wire.

In both screens, Plaintiffs' Exhibit 2 and Plaintiffs' Exhibit 7, it is necessary for the wires to go up as much as they go down, because if you didn't, you couldn't get the intersecting wires over it. In

(Testimony of Frank E. Essley.)

other words, if it wasn't twice the diameter of the two wires—or one wire, assuming the two wires are the same diameter—if you didn't, you couldn't weave it. [57] It wouldn't go in. The intersecting wire wouldn't go in there at all. In each screen, it is necessary for the wire in order to cross the intersecting wire to go just as high in order to cross it as it goes low in the next stage to cross the next intersecting wire.

With regard to the difference in the manner by which the wire in the Palmer screen attains the necessary height or depth to cross the intersecting wire, and the manner in which the Potter screen, Plaintiffs' Exhibit 7, attains the same height or depth, on the Potter screen, Plaintiffs' Exhibit 7, the cups are deep enough, are as deep as the diameter of the wire. In other words, the intersecting wire fits down in the cup without any protrusion above, so that the wire comes immediately up to the level necessary to cross the intersecting wire. On Plaintiffs' Exhibit 2, owing to the fact that you have a shallow crimp here, you either have to have an arch across the intersecting wire here or it would have to be a crimp, as in the double crimp wire to cross this intersecting wire. It has to be twice the diameter of these wires. Where this is a shallow crimp, the wire has to be bowed to go across the intersecting wire. In Plaintiffs' Exhibit 7, the cup coming immediately up to the level of the intersecting wire, no arch is necessary. The difference between Plaintiff's Exhibit 2 and Plain-

(Testimony of Frank E. Essley.)

tiffs' Exhibit 7 with respect to the manner in which the wire attains a height sufficient to cross the next intersecting wire is that in Exhibit 7, which is the Potter patent, the cups are deep enough to take—well, the depth of it is the diameter of the intersecting wire. In other words, it is deep enough that the wire can fit in there and still the wire be on a straight line with that intersecting wire. That differs from Plaintiffs' Exhibit 2 in that the shallow crimp in this Exhibit No. 2, the [58] crimp is so shallow that there has to be an arch for the intersecting wire to go under, and the arch has to be high enough to compensate for the shallow crimp on the lower side of the screen. In other words, it has to be, to get an even plane, a smooth side on the screen, the wire has to be arched high enough so the intersecting wire can fit underneath it. It would not be possible to have a straight wire between the cups as I have testified to, as is shown by Exhibit 7, the Potter type patent, and at the same time have crimps such as those shown in Exhibit 2, because the cups in Exhibit 7 are deep enough to take the intersecting wire, and if you put an arch in that, the wire would be loose. There would be a space between. It would not be possible to have a shallow crimp as shown by Exhibit 2 and at the same time have a straight wire across as shown by Exhibit 7. Referring to Plaintiffs' Exhibit 7, if the cups weren't so deep as they are, you couldn't have this straight plane across here, because this intersecting wire has to fit underneath

(Testimony of Frank E. Essley.)

this one, and if this was a shallower crimp, there would have to be an arch or another crimp put in here. Looking at Plaintiffs' Exhibit 2 with the crimps it has, it would not be possible to have the wires between the crimps flat and still weave the screen, for the reason that it has got—the crimp is shallow and there has to be space provided through an arch or crimp for the intersecting wire to fit in. If you have that same crimp and the wire went straight across, the intersecting wire would not get through. If you have cups in your wire as shown by Exhibit 7, the Potter type exhibit, you could not at the same time in connection therewith have an arch with those cups, the arch being like that shown in Exhibit 2, because the cups in Exhibit 7 are deep enough so you have a straight plane across the screen in both directions, and if you put an arch in [59] between, they wouldn't even fit in the cups of the next. It would be up above and the screen would be so loose it would just fall to pieces.

Referring to Defendants' Exhibit A-15, the opening which is left between a plane crossing the top of the crimps, rather than across the bottom of the crimps in the screen and the top of the arch is less than $\frac{3}{8}$ of an inch. The size of the wire is $\frac{7}{16}$, and it would not go through the opening of less than $\frac{3}{8}$ of an inch. Referring to Defendants' Exhibit A-13 and Defendants' Exhibit A-16, both described as bars or wires $1\frac{1}{2}$ by $\frac{3}{8}$, if I cross the

(Testimony of Frank E. Essley.)

arch of one wire across the crimp of the other, and take this card and place it across the top of the arches on either side of the cross wire, it is not possible for the card to touch the tops of both of the arches simultaneously on each side of the cross wire. The cross wire extends higher than the plane of the tops of the two arches in the other wire. Laying these two wires, Defendants' Exhibit A-13 and Defendants' Exhibit A-16 together, the crimps and arches of these two wires do not exactly correspond with each other. The space between the bottom of the crimp of one wire and the bottom of the next wire is a different length than the space between the bottom of the crimp of the other wire and the bottom of the next crimp of such other wire. Taking Plaintiffs' Exhibit 2 and laying this card across the upper side or flatter side of that screen from one arch to the next, it is possible to touch both arches simultaneously, and at the same time touch the top of the arch of the intersecting wire. They are all on the same plane.

I take this notched card and apply it to Plaintiffs' Exhibit 3, inserting it, and with the pencil draw on the card the profile or shape of the arch of Plaintiffs' Exhibit 3. I insert this notched card in the screen, Plaintiffs' Exhibit 3, [60] and trace along the wire of the arch of that exhibit by black pencil. Taking a red pencil I do likewise on the same card with Plaintiffs' Exhibit 2. The two arches of those two screens, plaintiffs' Exhibits 2 and 3, are substantially uniform in curvature.

(Testimony of Frank E. Essley.)

(Card marked Plaintiffs' Exhibit 21 for identification.)

With reference to the curvature of the arch in these two screens, Plaintiffs' Exhibits 2 and 3, as observed by me and demonstrated by my drawing on Plaintiffs' Exhibit 21, the arch of Plaintiffs' Exhibit 2 which I have drawn in red pencil is slightly more of an arch than Plaintiffs' Exhibit 3 which I have drawn in black pencil. The two arches are substantially similar.

(Plaintiffs' Exhibit 21 received in evidence.)

I now take Plaintiffs' Exhibit 21 and apply it to Plaintiffs Exhibit 7 and trace in green pencil the profile of the space between the two cups. I write on Plaintiffs' Exhibit 21 the word, Exhibit 7, with a little arrow pointing to the green line. I write also, Exhibit 2, with an arrow to the red line, and, Exhibit 3, with an arrow to the black line.

In Plaintiffs' Exhibit 2 the arches in that screen are of uniform curvature. From my observation of the screens in use, I know that it is necessary to the successful operation of a screen containing shallow crimps and arches of the character shown in Exhibit 2 that the arches be uniform with each other, because if the arches weren't uniform, if one was higher than the other, the higher wire would not have any tension on the cross wire and that would have a tendency to loosen up; and also where the wire was humped up would make a bigger open-

(Testimony of Frank E. Essley.)

ning for gravel or rock to slide through at an angle and you would get off size material through your screen. To state whether or not [61] a wire screen is made of high carbon spring steel, I would have to test the wires.

Cross-Examination

The witness, Frank E. Essley, testified on cross-examination in answer to questions by Mr. Catlett:

My position with the Western Fence and Wire Company is sales manager. As sales manager I am in competition with the product of the defendant. We both sell in the Northwest and the competition is pretty sharp. As sales manager it is generally my duty and policy to press the advantages of the Flint screens as against the screens of the defendant. When I was with Roebling I had nothing to do with designing any screens, nor manufacturing any screens. My work was as a clerk and salesman. I was with Roebling during the war period, serving in general the Portland territory. Roebling has an office in Seattle and in California. During that period of time when it was difficult to get the product out to the West Coast it was Roebling's policy to buy screens from manufacturers on the West Coast. I do not know whether Roebling bought for the Washington market from the defendant, nor whether they bought from Abbey Sherer for the California market. They could have done so.

(Testimony of Frank E. Essley.)

It isn't customary for manufacturers to keep on hand a stock of wire screens. They are generally manufactured to order. According to the market Roebling sells different products in the East than in the West. Roebling also manufactures specialties. Roebling could manufacture specialties on order for the eastern market without its getting in the catalog. I visited the Roebling factory in November, 1940. That is the only time I have been there. I was there six weeks. That was an educational trip. At that time I was chief clerk. [62]

In going around to visit some of these gravel plants I have seen some of the defendant's screens in sizes all the way from the finest to the four inch, I believe, is the largest. I couldn't answer what is the smallest screen the defendant makes. I do not know whether the defendant makes small screens in the flat-top type. Not to my knowledge does the defendant manufacture screens under an inch and a half. The only screen that the plaintiff has produced here except the worn one and the screen which we are making all these drawings and comparisons with is an inch and a half screen. I made no comparison or drawing with any screen of the defendant larger than an inch and a half. If I had done so my drawings would have shown a similar arch in those larger screens.

(At 12:05 o'clock p.m., Wednesday, October 19, 1949, proceedings recessed until 1:45 o'clock p.m., Wednesday, October 19, 1949.)

(Testimony of Frank E. Essley.)

October 19, 1949, 1:45 o'Clock P.M.

On cross-examination; the witness Frank E. Essley, further testified; in answer to questions by Mr. Catlett:

During the period I was with Roebling, Roebling manufactured a screen of their own. This screen was the so-called basket-weave, and the double crimp, and their trade name for another one was the high low crimp. There were three types of crimp. You have the high low crimp wire there on the floor, for instance. I didn't mean high low crimp, I meant the basket weave or the double crimp. That is plaintiffs' Exhibit No. 8. The high low crimp differs from that in that it comes exactly straight across. It comes across in a straight line. Then there is a raise up half the diameter of the intersecting wire, and hence [63] on a plane to the next intersecting wire and the crimp is downward instead of upward. I can show you a cut of that in the catalog, if you want to see it. On Page 37, in Plaintiffs' Exhibit 17, the Roebling catalog, is an example of a high low crimp. That is the only high low type I am familiar with. There could be another one. The other types of double crimp are the three that I named. The third is called the extra crimp with the basket weave. The basket weave or the double crimp is illustrated by Plaintiffs' Exhibit 8. The high low crimp is illustrated by a drawing on Page 37 of Plaintiffs' Exhibit 17. The third kind is the intermediate crimp, as shown on

(Testimony of Frank E. Essley.)

Page 18 of the Roebling catalog. These are all the screens to my knowledge that Roebling made for sand and gravel screens. They make some different screens now. They now make the flat top screen.

The period during which I have seen a number of the defendants' screens on my trips is since the time that I have been on the road for the Western Fence and Wire Works, or since 1945. I did not testify that all that I saw were similar to Plaintiffs' Exhibit 2. I saw screens that they manufactured smaller than an inch and a half opening with the so-called basket weave. The basket weave has nothing to do with the Palmer patent to my knowledge. I saw some smaller ones that were of the basket weave or double crimp. Also I saw screens similar to Exhibit No. 2. All the other screens I saw were similar to Exhibit 2. I do not mean the same size opening. I saw openings of all sizes. I mean to say that the larger ones that I saw had similar arches to this one. It is a fact that as you increase the size of the opening you must of necessity extend the length of the arches. I saw screens like Exhibit A-22. Referring to A-22, I call that an arch between the two crimps. I understand the word "arch" to mean where there is a contour on the wire over the cross or the shot [64] wire. It is not true that in my definition of an arch any wire that crosses another wire does so by means of an arch. An arch is when a wire is manufactured in an arc. It can be a long one, a short arch or any-

(Testimony of Frank E. Essley.)

thing, just so it is arched. An arch isn't flat. The wire between the two crimps on Defendants' Exhibit A-22 has a slight arch in it. My meaning is approximately that it isn't perfectly flat. An arch can have a progressively inclined surface, but there is all different contours of arcs. The meaning of the word "arch" indicates to a slight degree that it is progressively curved. I don't see that that is a flat surface. I say that is an arch. If Mr. Palmer said that this particular one did not infringe his patent, I would disagree. I believe it does. With regard to the similarity between Defendants' Exhibit A-22 and Plaintiffs' Exhibit 2, Defendants' Exhibit A-22 has a slight arch. It doesn't have as much arch as Exhibit 2. The word "similar" in my mind means the contour of the arch. There is a more pronounced arch in Exhibit 2 than in Exhibit A-22. It is not similar, but it is still an arch. The arches wouldn't be exactly similar. When I saw these screens on my trips nobody is able by looking at a screen to identify it and tell who manufactured it. I identified these screens by looking at the shipping tag that is on them. I could only identify them by means of the shipping tags. There would be no way of knowing who put on the shipping tag. At times screen manufacturers buy screens from other people and sell them. Roebling's have done that—we have done it. So the fact that there is a shipping tag on it doesn't necessarily indicate who manufactured it.

Right offhand, I have no way of telling how many

(Testimony of Frank E. Essley.)

screens of the one and a half inch size I saw or how many other different sizes.

The wire size has a very definite bearing on the life [65] of a screen. I think I can determine the absolute uniformity of a screen by merely looking at it. The variations in every arch and crimp would be so slight that they wouldn't be distinguishable by the naked eye. You could have some variation without being able to distinguish it by the naked eye. As to whether the lack of uniformity would necessarily mean that a screen was defective, it is according to how much variation there was in the arches, or the crimps. It would depend on the extent of the lack of uniformity.

In Plaintiffs' Exhibit 7, the Potter patent, I would term those crimps as deep cuts. They slope abruptly from the bottom of the crimp to the flat part of the wires as crosses between crimps. Comparing them with Plaintiffs' Exhibit 3, the Palmer patent, they are very much more abrupt than the crimps in the Palmer patent. Referring to Defendant's Exhibit A-23, in such a small sample it is hard to say whether the arches are absolutely uniform, but I think they are very uniform. There isn't enough wire—this sample isn't big enough to really get a true picture of it. I would say they are uniform. The crimps this way are uniform. The Crimps this way are uniform. I mean uniform one way and not the other. In Exhibit A-21, some are uniform and some are not. A lot of that is owing to the smallness of the sample, that the

(Testimony of Frank E. Essley.)

ends of the wires, whichever way they are like this on the arches would be higher than it would be if you had another wire woven in there. I would say that the intermediate arches are uniform. The arch there is not flat on top. It is not true that there is an inch and a quarter of that arch which is perfectly flat. I would say right offhand that there is very little perfectly flat, because you can see daylight under each side of your ruler. The fact that they are not quite uniform is owing to the fact that there is no wires woven in here. You blend this wire down with the tension, you will throw more arch into this wire here. This is more, the place to judge the screen would be in there where it is under tension. I do not see any flat top to the so-called arch on Defendants' Exhibit A-21.

Redirect Examination

On redirect examination in answer to questions by Mr. LeSourd, the witness, Frank E. Essley, testified:

I testified on cross-examination with regard to Defendants' Exhibits A-21 and A-23 that the lack of uniformity as to the plane or top of the screen which I found in one or two instances in those screens, was due to the fact that the ends of the wire were loose and had not been formed into the shape they would be formed in if another strand were woven in. Looking at Defendants' Exhibit A-21, with regard to the relative position of the wires on the outside edge of the screen, the two

(Testimony of Frank E. Essley.)

alternate wires here are on a higher plane than the two opposite wires. In other words, the next wire would weave over this, under this wire, over this, and under this. That would throw more of an arch into this particular section of the screen right here, because that would have to be pulled down to get another wire in using the same crimp as in one of these wires.

When I testified that the screens I saw in various plants were similar to Plaintiffs' Exhibit 2, I meant that the screens were made with a shallow crimp and an elongated arch. Those arches are not formed to the exact curvature of the different screens. Now on an inch and a half screen the arch is more pronounced than it would be on a two-inch screen. Therefore, the arch on a two-inch screen would be more elongated. In selling and observing the operation and use of these screens in the Northwest, I have had occasion to observe the effect of lack of uniformity in [67] the arches of a screen on its success in actual use. It would take very little lack of uniformity to cause a screen to be unsuccessful in actual use. It would take very little variation in the arches to make the great difference, because if one arch was arched upward more than the one next to it, there would be no tension between the high arch and the crimp on the lower side. That would cause a loose screen or a loose wire in a screen which would permit the two wires to rub together and soon wear themselves out, instead of

(Testimony of Frank E. Essley.)

being worn out by the material going over and through them. They would wear out between themselves.

Recross-Examination

On recross-examination in answers to questions by Mr. Catlett, the witness, Frank E. Essley, testified:

Referring to Defendants' Exhibit A-24, in my judgment that crimp is a shallow crimp. The wire between the crimps is arched. I did not see any of the screens of this type that I thought were manufactured by the defendant on my trips. I saw a screen similar to Defendants' Exhibit A-27. I would say those crimps were shallow crimps, and the wire between those crimps is arched. It goes on an arched principle at times. It does not have a flat top. It has a definite arch. My ruler does not touch for about three inches across that. Those arches are uniform. I do not have a ruler large enough to go across those. We would have to get a straight edge. I think that sample is large enough to determine the question as to whether there is absolute uniformity between the arches.

(At this point the plaintiff rested.)

JOSEPH E. LIPPINCOTT

testifying by deposition on behalf of the defendants, testified as follows: [68]

My name is Joseph E. Lippincott and address is 66 Main Street, Roebling, N. J. My present employment is Designer and Assistant Staff Engineer. My technical training consists of the study of Mechanical Engineering and the experience of 47 years with the Roebling Company. I have been connected with the Woven Wire Fabrics Division of the Roebling Company for 31 years in the capacities of Draftsman and Designer, General Foreman, and now Assistant Staff Engineer.

The Roebling Company has manufactured and sold woven wire screening of all types for the past 47 years that I have been connected with them and for approximately 25 years prior to that. The Company was incorporated as the New Jersey Wire Cloth Company on November 1, 1878. In the very early years of the Company's existence they manufactured the common types of screen known as double crimp and intercrimp, in classes known as window screen and fine and coarse industrial screen. As time went on, various new types were developed and manufactured to suit demands of the times. These, of course, were all made in various types of metals, the same as today.

The Roebling Company has manufactured the flat top type of screen since 1932. My part in the manufacture of these screens has been to design all the crimping dies, etc., and to supervise their use.

(Deposition of Joseph E. Lippincott.)

In the manufacture of Flat Top type screens, the same as in any other, there are certain definite principles of construction that must be incorporated in the design. These screens are made in several different types of steel and the design must be such as to permit fabrication of any of those types without setting up internal stresses and strains which would cause premature failure of any of the wires before the screen is worn out. With this thought in mind, the crimping dies are designed to set up minimum strains in the wire [69] itself, and at the same time, produce a rigid screen after fabrication.

Other connections I have had in the manufacture of woven wire screen is to work out tables, rules, and formulas for all and various types of weave with maximum and minimum limits as to wire, mesh, and maximum amounts of crimp permissible for certain specifications, etc. I have designed several types of screen for the Roebling Company which the company did and still is manufacturing. We designed what we called a Hy-Lo type crimp, shown on Page 4 of our Catalog W-903, back about 1925. We then designed the Roeflat type shown on Page 2 of the same catalog, in 1932. The Roeslot (2) types shown on Page 6 was designed in 1935. In 1948 we designed a Flat Roeslot type not shown in the catalog. We can furnish photostats or prints of all these types.

The Court: Let "A" be marked Defendants' Exhibit A-1; let "B" be marked Defendants' Ex-

(Deposition of Joseph E. Lippincott.)

hibit A-2; let "C" be marked Defendants' Exhibit A-3; let "D" be marked Defendants' Exhibit A-4.

(Photostats marked Defendants' Exhibits A-1, A-2, A-3 and A-4 for Identification.)

Photostats and prints attached marked "A," "B," "C" and "D," dates shown on each print. The Roebling Company manufactured all these types of screen as soon as they were designed on or about the dates mentioned. "A" designed 1925; "B" designed 1932; "C" designed 1935; "D" designed 1948. Early designs were made from sketches which have been lost or destroyed.

It would be quite a lengthy process to detail all the steps in the process of manufacture of all the above-mentioned screens. Suffice it to say, the steps are about the same in any or all of these screens and, in simple terms, are as follows: The first operation is the crimping of the wire for both the warp [70] and fill. The second operation is threading up the loom. The third operation is weaving or feeding in the filling wires either manually or mechanically. When the wire of which the screen is made comes from the coil it possesses a natural curvature. The crimping of the wire in a Flat Top type naturally produces an arch when you do not employ dies to prevent. We, of the Roebling Company, design our crimping dies in such a way as to remove the arch. Our dies are made with a hard flat plate at the bottom to remove or prevent this arch or bow from forming as the

(Deposition of Joseph E. Lippincott.)

crimps are produced. The nicks in which the interlacing wires lay are produced by a "Nicker Tooth" placed in the die for that purpose. See TC 572 Exhibit "B."

That arch, whether a natural arch as a result of coiled wire, or an arch produced by the crimping, was known to the manufacturers of woven wire screens prior to the dates of my prints. This bow or arch is a natural result of crimping unless something is done to prevent it. We knew of its existence and did something to prevent it for the reason just mentioned. Other manufacturers knew of it also, but we cannot say just how long previous to the design of our dies. Several years to my knowledge. That arch was removed deliberately by John A. Roebling's Sons Company in order to give longer life to the screen.

I am acquainted with the S. H. Palmer Patent No. 2074665. At the date of this patent there was nothing new about it. It involves nothing that was not already known by myself at the date of this patent.

33. Does it, in your judgment, involve any inventive genius or invention?

Mr. LeSourd: If the Court please, I will object to that question on the ground that it calls for a conclusion of the witness as to invention, which is the province of the Court, the witness not having been qualified for that purpose. [71]

The Court: The objection is overruled. The Court will hear the testimony

(Deposition of Joseph E. Lippincott.)

Answer: "No."

This patent does not include anything not already known to ourselves and other manufacturers of woven wire screens at about 1932 or slightly before that date. I know whether any other manufacturers of woven wire screens made or sold the flat top type of woven wire screen prior to August 2, 1932. This type of screen was made and sold by the Manganese Steel Forge Company of Philadelphia, Pa., back about 1918, under the Rol-Man Patent. Also, refer to Patent No. 1,139,469, issued to W. S. Potter, May 11, 1915; also, Patent No. 1,814,598, issued to R. Herrmann, July 14, 1931.

We were familiar with the art of wire screen weaving for several years prior to 1932. The flat top construction type of woven wire screens was known and in use and being manufactured prior to that time. An arch or bow between crimps similar to the arch in the Palmer patent was known to manufacturers of woven wire screens prior to August 2, 1932. I am familiar with the Winfield Scott Potter patent No. 1139469, issued May 11, 1915.

41. If so, does the S. H. Palmer patent contain any new and useful features which do not appear in the Potter patent? If so, enumerate them.

Mr. LeSourd: If the Court please, we object to that question on the ground that it calls for the construction of the terms of written instruments, namely, the two patents involved, and an attempt to interpret the terms of those instruments and thus compare them. The witness is not qualified to ex-

(Deposition of Joseph E. Lippincott.)

press an opinion on the construction of a patent, and we have cited cases in the memorandum of authorities filed with the Court on that subject to which I can refer [72] if the Court so desires.

The Court: The Court will overrule the objection and will hear the testimony. What effect it has upon the Court is a matter which may be the subject of proper argument later.

Answer: "No.

I am familiar with the patent issued to J. W. Galloway, on May 2, 1933, No. 190756.

43. If you are not familiar with the Galloway patent, will you examine the copy of that patent, No. 190756, look at the prints, read the claims carefully and then state whether or not in your judgment there is anything new or useful in the Palmer patent which does not appear in the Galloway patent?"

Mr. LeSourd: If the Court please, the plaintiff makes the same objection to this question. It calls for construction of the terms of written instruments and calls for the opinion on the construction of a patent as to which this witness is not qualified.

The Court: Overruled.

Answer: "No, nothing.

44. Calling your attention to Figures 2, 3, 5 and 6 in the Galloway patent, do those Figures also show arches even more exaggerated than in the Palmer patent?"

Mr. LeSourd: If the Court please, the plaintiff makes the same objection last stated to this question.

(Deposition of Joseph E. Lippincott.)

The Court: The objection is overruled.

Answer: "Yes.

Assuming all screens are made from spring steel, we would say the rectangular mesh or opening, which we term "Roeslot," would be the most efficient for mining or gravel use. The rectangular mesh may not, however, produce the most accurate sizing which is quite important in a gravel screen. The Roeslot screens, as made by us, are made of the Flat Top type of crimp in one direction and double crimped wire in the other direction which produces a Flat Top type of screen. This is usually in the smaller size of meshes; the larger sizes may have the Flat Top type of crimp in both directions, but these are not quite so common. The dies used by us definitely remove or prevent the formation of any arch or bow except in a very tight mesh where there might be a slight arch formed in weaving, as indicated in Exhibit "E".

The Court: Let that be marked Defendants' Exhibit A-5.

(Wire screen marked Defendants' Exhibit A-5 for Identification.)

The one and only feature which identifies the flat top type of screen is these crimps are all on one side of the screen only and there is a flat wearing surface on the other. The flat top type of screen has been in use about 16 or 17 years prior to 1932. The construction provided by Palmer could be considered as an improvement only in the fact that the crimping is

(Deposition of Joseph E. Lippincott.)

less severe on the wire. That is, the bends or crimps are less severe. However, a proper type of wire overcomes this advantage and allows a more severe crimp in removing the arch. In my opinion, considering wear on a finished screen only, a screen constructed on the Palmer plan will not wear quite as long as one constructed on our plan which is the same as the Scott Potter plan. This is because the Potter plan presents more wearing surface than the Palmer plan. The flat top construction under the Potter plan if properly made from the right kind of steel, will maintain uniform openings during the wearing life of the screen.

Projections above the top plane of the screen are objectionable. The reason for this is because any projection presents [74] a wearing surface above the body of the screen and as they are worn off the life of the screen is reduced accordingly. The arches of the Palmer screen are above the mean plane of the screen. This feature is objectionable in our opinion, because as stated in the previous question, all or any projections wear faster than the main body of the screen. Therefore, in the Palmer screen, the bow or high arches tend to wear in the center, with the result that the wires are worn through in the center while at either side there is still a considerable amount of wire that has very little or no wear. The Palmer plan of construction did not constitute an advance in the screen making art; it simply produced a slightly different type of flat top construc-

(Deposition of Joseph E. Lippincott.)

tion, which was known by myself when designing our Flat Top type of crimps. It constituted a going backward, in a sense, because the same principle had been developed so many years before by Potter, Hermann, Rol-Man, and others.

Mr. LeSourd: If the Court please, I wish to move to strike the answer to question No. 56 for the same reason as above stated; that is, that he has attempted to construe the terms of written instruments, namely the patents involved, and is not qualified to do so.

The Court: Denied.

It does not perform any new function.

It is possible to cold press crimps into 3/8 inch or larger high carbon and high manganese content spring wire without producing bows in the wire between crimps so long as the manganese content is not too high, and providing the steel has had the proper heat treatment. It is also possible to crimp without producing the bows. Almost any desired crimp or shape can be produced providing the wire has the proper chemical and physical properties and the proper design or dies is used. As [75] stated in No. 46, it is necessary to have the proper dies to remove or prevent the bow from forming. It is not possible to crimp such wire for flat top type of construction without bows without dies specifically designed to permit the bow forming. If bows are present they will vary in length with the size of the opening. The flat portion between the crimps also will vary with the size of the opening. These will

(Deposition of Joseph E. Lippincott.)

appear to be more of a bow or an arch with the smaller openings.

Cross-Interrogatories

In the testimony given in reply to Interrogatories 8, 9, 35, 36, 38, 47, 49 and 52, would say the "flat top" or "Roeflat" screen, concerning which we have testified, is fundamentally the same as the Potter patent No. 1,139,469, dated May 11, 1915. With regard to the manner in which any "flat top" screen, concerning which I have testified, differs from that disclosed in the Potter patent, if it is not the same type as the Potter patent, there is one "flat top" screen of which we have testified, namely, the "Flint Screen" manufactured by the Western Fence & Wire Works under the Palmer patent No. 2,074,665, which differs only in the fact that it contains a slight "natural" arch or bow between the crimps. We explained this feature in our answer to question No. 25. The design of our original "Roeflat Screen" was identical to that of the Potter patent, although we did not realize it at the time of its design. Our dies were designed to remove or prevent this "natural" arch from forming, as far as practical manufacturing practice will allow. Our present "Roeflat Screens" are the same as the Potter screen, except that we have improved its design by placing a "Nick" at the intersection of the straight portion of the wire to help prevent the longitudinal wire from shifting out of place. This nick is similar in

(Deposition of Joseph E. Lippincott.)

design to that shown in the Hermann patent [76] No. 1,814,598, of July 14, 1941.

The information on which I base my testimony that an arch or bow between crimps similar to the arch in the Palmer patent was known to manufacturers of woven wire screens prior to August 2, 1932, was that the information that we had on this "natural" arch was from our observation of some of other manufacturer's screens and from our own knowledge and experience in the design of this and other types of screens and the dies for making same.

All the answers to all the interrogatories of this subject are from my own knowledge and experience and I have collaborated with no one else on any detail because, as a matter of fact, there is no one else left in the compauy who is familiar with all of these questions. All those who would have been familiar with them have either been retired or died. It will only be a matter of a few more months before I myself will be on the retired list.

(Defendants' Exhibits A-1, A-2, A-3, A-4, and A-5 received in evidence.)

DUNCAN C. DOBSON

testifying by deposition on behalf of the defendants, testified as follows:

My name is Duncan C. Dobson, 634 South Newstead Avenue, St. Louis, Missouri. My present employment is as President of the Ludlow-Saylor Wire Company. I have had no actual technical training.

(Deposition of Duncan C. Dobson.)

Have had 18 years practical experience in dealing with the manufacture and sale of all types of woven wire screens. I first came with the Ludlow-Saylor Wire Company in September of 1931. Have served as salesman, assistant production manager, office manager, secretary, sales manager, and president.

The Ludlow-Saylor Wire Company engaged 100% in the [77] manufacture and sale of woven wire screens, the annual sales running in excess of two million dollars. It has been so engaged since 1895 and covers in the sale of these screens the entire United States and the rest of the world. It has been engaged in the manufacture and sale of woven wire screens for fifty-four years. The corporation makes and sells every variety of woven wire screen that can be made. We have one plant which is located in St. Louis, Missouri.

The Ludlow-Saylor Wire Company manufactures woven wire screens of the flat top construction type. The screens are woven in such a way that all of the crimps in the wires are on one side of the screens so that the opposite side of the screens have a flat smooth surface and are practically flat. In its manufacture of that type of screen the Ludlow-Saylor Wire Company uses what is commonly known as a gravel spring steel wire. This wire is high carbon and high manganese content wire. The approximate time when the flat top construction type screen was first used by the Ludlow-Saylor Wire Company was 1931. The Ludlow-Saylor Wire Company on March 26, 1931, received an order

(Deposition of Duncan C. Dobson.)

from the American Agriculture Chemical Company, 1602 Syndicate Trust Building, St. Louis, Missouri, for 4 pieces 5 feet long x 36 inches wide 3 1/2" opening, 3/8" diameter wire high carbon wire made with one side flat. We manufactured screens under that order and the screens were delivered on April 6, 1931, to the American Agricultural Chemical Company at National Stock Yards, East St. Louis, Illinois. This cloth was woven of high carbon wire. These wires were crimped. One side of the screen was flat, or practically so. All of the crimps were on one side of the screen. The opposite side of the screen was practically flat. The screens were cold pressed.

The Ludlow-Saylor Wire Company furnished these facts to [8] a Mr. Estill E. Ezell. He is a patent attorney in St. Louis, Missouri who claimed to represent Little, Leader, LeSourd & Palmer. The Ludlow-Saylor Wire Company delivered to Mr. Ezell a sample made by it of the actual screen made by it on March 28, 1931.

Mr. LeSourd: I would like to point out to the Court that we have introduced that sample already in evidence, being Plaintiffs' Exhibit 9.

The Ludlow-Saylor Wire Company does not have on hand any samples of the actual screen made in 1931 on the above order. The samples made up on March 23, 1949, were duplicates of those furnished the American Agricultural Chemical Company. The sample furnished Mr. Ezell was identical

(Deposition of Duncan C. Dobson.)

with a sample sent to Messrs. Catlett, Hartman, Jarvis & Williams, of Seattle, Washington, attorneys for the defendant company.

The flat top construction type of screen was not manufactured and sold or used by the Ludlow-Saylor Wire Company prior to that time. It was used before that by the Manganese Steel Forge Company, Philadelphia, Pennsylvania. The Ludlow-Saylor Wire Company has continued to manufacture and sell the flat top construction type of screen since the date I have mentioned.

I am familiar with the Winfield Scott Potter patent No. 1139469, issued May 11, 1915. That patent is concerned with the flat top construction type of screen. The process of manufacture of the flat top construction type of screen being manufactured by the Ludlow-Saylor Wire Company is that we use two methods of crimping the wires for flat top construction (1) The wires are crimped on the press. (2) The wires are crimped by crimping wheels. After the wires are crimped by either of these methods, the material is woven in to screens on a bench type loom. [79] When the wire comes from the coil the wire has a natural curvature. The crimping of the wire does not produce an arch in it as there is a natural arch in the wire as it comes from the coil.

I was and am familiar with the state of the art of the manufacture of woven wire screens as it existed prior to August 2, 1932. The flat top con-

(Deposition of Duncan C. Dobson.)

struction type of screen was known and in use and being manufactured prior to that time. I am generally acquainted with the Samuel H. Palmer patent No. 2074665. An arch between crimps, similar to the arch shown in the Palmer patent was known to manufacturers of woven wire screens prior to August 2, 1932. The Ludlow-Saylor Wire Company does not do anything to remove the natural curvature. The Palmer patent has nothing which was new and useful in the light of my knowledge of the state of the art prior to August 2, 1932, and it involves nothing which was not already known.

52. Does it, in your judgment, involve any invention?

Mr. LeSourd: I will object to that question on the ground that it calls for a conclusion of law on the ultimate question before this Court, and the witness has not been qualified to answer the same.

Mr. Catlett: The same question Your Honor has already ruled on.

The Court: The objection is overruled.

Answer: No.

It does not involve anything more than mechanical skill. It does not include anything not already known and used or deliberately discarded by manufacturers of woven wire screen prior to that time.

55. Is there anything, in your judgment, in the claims of the Palmer patent which is new and useful, that is not contained or covered by the Potter patent, a copy of which is [80] attached to these interroga-

(Deposition of Duncan C. Dobson.)

tories, and to which your attention has been previously called?

Mr. LeSourd: I will object to that question on the ground that it calls for the construction of written instruments, and a conclusion and opinion on a conclusion of law as to which this witness is not qualified.

The Court: The objection is overruled.

Answer: No.

I am generally familiar with the Galloway patent No. 1907056.

58. Is there anything new and useful in the claims in the Palmer patent not covered in the Galloway patent?

Mr. LeSourd: I object to that question on the ground that it calls for the construction of written instruments and a conclusion of law.

The Court: Overruled.

Answer: No.

59. Is there any substantial or useful difference between the two?

Mr. LeSourd: I will make the same objection.

The Court: Overruled.

Answer: No.

Cross-Interrogatories

The woven wire screens of the "flat top" construction of which I have testified were and are of the same type as that shown and described in the patent to Potter, No. 1,139,469, May 11, 1915. There is no difference between any "flat top" screen concerning

(Deposition of Duncan C. Dobson.)

which I have testified and that shown in the Potter patent. A sample of the "flat top" screen to which I have referred was submitted to Mr. Estill Ezell, representing the law firm of Little, Leader, LeSourd & Palmer. [81]

When I testified that an arch between crimps similar to the arch shown in the Palmer patent was known to manufacturers of woven wire screen prior to August 2, 1932, the manufacturer that knew of this arch was the Manganese Steel Forge Company, Philadelphia, Pennsylvania. They knew of the arch approximately in 1925. We received advertisement showing cuts of this type of material and also containing testimonial letters from two of their customers who had used the material, both letters dated 1925. In answer to the question of whether I myself at any time observed this arch, I did not actually see the material, only cuts in their advertisement. In answer to the question, "Describe exactly the arch known to each of these manufacturers and state how it was formed and to what use it was put," I would answer that we are not familiar with their method of manufacture. As to whether any of these manufacturers ever used this arch in a completed woven wire screen, I refer to my answer stating that our information was through the advertisement. We do not know the actual size of specifications furnished by Manganese Steel Forge Company to their customers as their advertisement indicated they were equipped to furnish specifications.

(Deposition of Duncan C. Dobson.)

In testifying that the Palmer patent does not include anything not already known and used or deliberately discarded by manufacturers of woven wire screen prior to 1932, I considered all features of the disclosure of the Palmer patent. The persons by whom each feature was, prior to August 2, 1932, known and used, or known or used and deliberately discarded, are Manganese Steel Forge Company, Philadelphia, Pennsylvania, and the Ludlow-Saylor Wire Company, St. Louis, Missouri. As to how we came to know each item of information concerning the knowledge or use of the arch disclosed in the Palmer patent, my answer is that in the manufacture of flat top construction screens by our company [82] the natural curvature of the wire coming from the coil was very evident. The conditions and circumstances under which I became familiar with the arch were in the normal course of observing the manufacture of this type of screen. There were completed woven wire screens containing all of the features of the Palmer patent made prior to August, 1932. The name of the weaver is not known. Woven on March 28, 1931, made of wire crimped as it came from the coil, woven in such a way that one side of screen was practically flat, all crimps being on the opposite side. Being production manager at that time, I was fully acquainted with these details. The screen was made with $3\frac{1}{2}$ inch opening, woven of $\frac{3}{8}$ " diameter wire of a high carbon wire and was woven in such a way that one side of the screen was practically flat, all of

(Deposition of Duncan C. Dobson.)

the crimps being on the opposite side of the screen. It is impossible to state the radius of whatever arch existed since this arch was caused by the natural curvature of the wire as it came from the coil. Whatever arch existed was between the crimps.

L. W. JONES,

testifying by deposition on behalf of the defendants,
testified as follows:

My name and address is L. W. Jones, Jr., 1310 Montgomery Avenue, Rosemont, Pennsylvania. My present employment is President of Manganese Steel Forge Co., Philadelphia, Pa. I have manufactured and sold woven wire screens since 1921. I have been 13 years as Vice-President and 15 years as President of Manganese Steel Forge Company.

Manganese Steel Forge Company manufactures and sells woven wire screens made from 11.00% to 14.00% austenitic manganese steel. It has been so engaged for 28 years. It covers United States, Canada and export to foreign countries. The [83] varieties that the corporation makes and sells are 11.00% to 14.00% Rol-man Manganese Steel "Double Lock Mesh" (flat top) woven screens. The Manganese Steel Forge Company manufactures woven wire screens of the flat top construction type. The main features which identify this type are the flat top surface with high points of crimps on opposite or back side. The Manganese Steel Forge Company does not use what is commonly known as "gravel spring

(Deposition of L. W. Jones.)

steel" wire. When you say "this wire," high carbon and manganese content wire, if you mean "this wire" as referring to "gravel spring steel" wire, yes, that is a commonly used terminology.

Manganese Steel Forge Company commenced using flat top type of construction in 1921. It was used prior to that time by Alloy Steel Forging Co., Carnegie, Pa. I am familiar with the Winfield Scott Potter patent No. 1139469, issued May 11, 1915. That patent is concerned with the flat top type of construction screens. Manganese Steel Forge Company was licensed and operated under the Potter patent. I am familiar with the Galloway patent No. 1907056, issued May 2, 1933. Manganese Steel Forge Company held a license under that patent. It would be too lengthy to describe in detail the process of manufacture of the flat top type of construction screen being manufactured by the Manganese Steel Forge Company, but the main difference lies in the fact that 11.00% to 14.00% manganese steel screen wires are hot crimped, whereas in the manufacture of spring steel screens, the rods are cold crimped.

In the manufacture under the Potter patent the rods or wires are "substantially straight" as he states; that is, as straight as good manufacturing practice will permit.

Cross-Interrogatories

In testifying concerning flat top type construction of [84] screen, the screens to which I refer are the same type as that shown and described in the patent

(Deposition of L. W. Jones.)

to Potter. Screens as described in the Potter patent, 1,139,469, are one of the flat top types referred to. A flat top type of screen which is not of the same type as that shown in the Potter patent concerning which I have testified, is screen made under the Galloway patent, 1,907,056, with an additional crimp between the deep downward crimps (typical of the screens made under Potter patent 1,139,469) are also a flat top type. Under the Potter patent the wires or bars between the crimps are substantially flat on their upper surface.

FRANK M. GUESS,

testifying by deposition on behalf of the defendants, testified as follows:

My name and address are Frank M. Guess, El Monte, California. I am Manager of the Abbey-Scherer Company, El Monte, California. I have had 16 years experience in the manufacture and sale of woven wire screens, principally industrial screens. I have been with Abbey-Scherer Company one year as half owner along with J. R. Scherer, the other $\frac{1}{2}$ owner. Ten years as sole owner. Since 1944 our oldest son, Joseph, has had a $\frac{1}{3}$ interest in the business. We sell woven wire screens quite extensively in California, Nevada, Arizona, New Mexico, parts of Texas and some shipments to Republic of Mexico and to the various islands in the Pacific. We have had a constant increase in business in this area since

(Deposition of Frank M. Guess.)

1934. I was not engaged in this business prior to my connection with Abbey-Scherer Company. Abbey-Scherer Company has been engaged in the manufacture and sale of woven wire screens since 1911, established in Detroit, Michigan. I have been engaged in it for 16 years. Abbey-Scherer [85] Company makes and sells industrial wire screens. It manufacturers screens of the flat top construction type. The main features which identify the flat top construction type of screen are just what the name implies. No crimped or stretched portion of the wire used comes in contact with the abrasive material passing over or through the screen.

I have registered with the United States Patent Office as a trademark, the trademark which includes the name "Flat Top." I have sent to Mr. Kay copy of trade-mark 370810. The trademark was registered September 5, 1939.

In the manufacture of this type of screen Abbey-Scherer Company is using what is commonly known as gravel spring steel wire. This wire is high carbon and high manganese content wire. The flat top construction type of screen was first used by me or by the Abbey-Scherer Company in 1933. It was not used before that to my knowledge by any other person or company. We have continued to manufacture and sell the flat top construction type of screens since said date. The Potter patent is identical except that we place an indentation half way between the two "humps" so that as the fill wire

(Deposition of Frank M. Guess.)

has a definite resting place and holds the size of opening exact.

I am not familiar with the Galloway patent, No. 1907056, issued May 2, 1933. After examination of drawing in the Galloway patent I would say it has no relation whatever to the flat top construction type of screen.

We have two distinct methods of manufacture for our "flat top." Heavy rods or wire are pre-crimped on various punch presses, some lead by hand and others by automatic lead. The other process is through crimpers we have developed. The finished product is the same in each case. The punch press operation requires straightening and cutting the wire, while the crimper [86] process comes off the coil. In each instance after crimping the warp is set up in the loom in which they are woven, the fill wire forced into their resting place, passing out finished except for cutting and trimming. When the wire comes from the coil there is a natural arch or set. (This arch is removed before crimping.) The crimping of the wire produces an arch in it but it is very simple to remove this arch or place more in it for that matter. Abbey-Scherer Company removes this curve or arch. The crimps in which the interlacing wire rests are produced on the punch press operation. The wire passes over dies which place the crimps and "nitch" (as we call it) for the interlacing wire. I consider the arch an objectionable feature.

(Deposition of Frank M. Guess.)

I was not familiar with the state of the art of manufacture of woven wire screens prior to August 2, 1932.

The arch, except that necessarily caused by the crimping, was removed by the Abbey-Scherer Company deliberately. I am not acquainted with the Samuel H. Palmer patent No. 2074665. I do not feel qualified to answer anything prior to August 2, 1932. Figure 1 of the Potter patent shows an arch slightly similar to that shown in the Palmer patent. There is a substantial or useful difference between the two. The Potter patent has a definite holding spot for interlacing wire while the Palmer patent appears to me to be nothing more than an old style double crimp. In fact, it would appear that under heavy load the wire in the Palmer patent would shift and lose sizing, while the Potter patent would hold the size of opening much better. Figures 2, 3, 5 and 6 in the Galloway patent, Exhibit 3, show arches between the crimps. The type of woven wire spring steel gravel and mining screen that produces the greatest efficiency is the flat top. The process employed by the Abbey-Scherer Company prevents the formation of any arch. As far as I know, flat top was not put in [87] use until 1933 and was not copied until several years later by other manufacturers. I never heard of the Potter patent until we started a suit against the Ludlow-Saylor Co. of St. Louis a few years ago. The construction provided by the Palmer patent is not an improvement on the flat top type.

(Deposition of Frank M. Guess.)

In my opinion, screens constructed on the Palmer patent will not wear longer. The flat top construction type maintains the uniformity of the openings during the wearing life of the screen. Projections above the top plane of the screen are objectionable because any projection is sure to receive more wear than anything perfectly flat. If for no other reason than that it would receive more weight of the load of the material being graded. While flat the weight would be more equally distributed. Also, anytime a wire is crimped there is an action on the grain structure which elongates it causing quicker wear on such parts. To the extent that Palmer provides for arches above the mean plane, the arches are objectionable. The Palmer patent plan of construction does not constitute an advance in the art of screen making. It constituted a retrogression. It does not perform any new function. It does not disclose any ingenuity or any result due to anything other than mechanical skill.

Cross-Interrogatories

The "flat top" construction type of screen concerning which I have testified is approximately the same as the Potter patent. As to any "flat top" construction type of screen to which I have testified which is not the same type as that shown in the Potter patent, I testified about the Galloway patent and the difference between the Galloway and the Potter is there is no similarity between the two as

(Deposition of Frank M. Guess.)

to construction. The Potter patent has between the crimps straight wire, while the Galloway is distorted in several different places between the crimps, which in [88] my estimation draws a line between the comparisons. [89]

KARL H. KAYE

called as a witness by and on behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

In answer to questions by Mr. Catlett, the witness testified:

My name is Karl Hubert Kaye. I reside at Winslow, Washington, Bainbridge Island. My business is manufacturer, woven wire screens and wire products. I am president and general manager of the defendant Pacific Wire Works. There has been two corporations. The company was founded in 1891 as a partnership. It was incorporated in 1907 and was disincorporated—I can't give you the exact date, I believe it was approximately 1944, I would have to look up on our records—for a period of about three years for tax purposes primarily, and was reincorporated in 1948. In the years between disincorporating and reincorporation in 1948, the business was conducted as a partnership between Matilda Kaye, my mother, and myself.

This business was established by P. C. Bergman, and shortly thereafter my father, Mr. Herman

(Testimony of Karl H. Kaye.)

Kaye, became one of the partners. The first time that I became connected in any way was when I was a boy working in the plant during the summer time while I was going to school. That was along in 1914 and 1915, and thereafter I worked there for several summers. I became connected with the plant again in 1931. I had worked in the plant when I was a boy and up into high school, but at the time I left college I did not enter the employment of the Pacific Wire Works until my father passed away in 1931. After that I was with them on full time employment for approximately three years, and then I left them and re-entered my former business of the investment business, [90] and went back again in 1939 and have been there ever since when I was able to purchase a block of stock.

I am familiar with the business of the company and its process of manufacture. We serve from Alaska to the north to Arizona in the south and California, of course, and as far east as North Dakota. We have made some export shipments to the Pacific as well. Our products are various types of wire cloth—that means industrial black galvanized, all types of wire, screens for aggregate in mining, wire fabricated products both woven and welded. That is of our manufacture. We also represent other companies but that is of our manufacture. We manufacture and handle wire screens. Wire screens have been manufactured for many years. I would say practically from the inception

(Testimony of Karl H. Kaye.)

of the company. There are different types of wire screens. Our handling of industrial wire screens for screening gravel or rock goes back many years, if you have reference to screens regardless of the type of wire that is in the screens. We have made screens for gravel use of a basic—what we call hard steel wire, and also out of galvanized wire. In those days, they used to use galvanized wire. I would say that would go back to—I believe the first catalog was issued around 1913 or thereabouts. I could get that exact date if it was required.

In the 30's the Pacific Wire Works Company was not purchasing any wire screens of the industrial type unless it would be in the year 1939, to my knowledge. Pacific Wire Works has purchased screens from the plaintiff in 1940 through 1944. We stopped purchasing at that time because we weren't entirely satisfied with the screen that we were getting, for one thing. We had some even come into our plant with broken wires in them that were replaced by Western Fence and Wire, but it necessitated a delay. We also found that when a purchaser of gravel screens [91] placed an order for a varied number of sizes at one time including in the sizes some of the larger openings which we were purchasing out and not making ourselves, and we were dependent upon our supplier for delivery. Sometimes he would get the same inquiry that we would, being in relatively a close distance from our plant, from Seattle to Portland, and our delivery date would naturally be longer than his

(Testimony of Karl H. Kaye.)

own delivery date, so therefore we found we lost the orders that we could make in our own plant. We lost the overall order because of the delivery date on that we were not manufacturing ourselves. We did, however, buy from other companies, too. We bought from the Abbey Scherer Company, El Monte, California. I might add that our purchases were beyond the range that we manufactured in our own plant, which began with the inch and a half opening, $\frac{3}{8}$ inch wire.

From 1944 on we have manufactured what we would term a pretty full range, from the finest in a spring steel wire. Ten mesh, No. 20 wire is the finest we make in our own plant, and I believe the coarsest, the largest opening, would be 4 inch opening, $\frac{5}{8}$ inch wire. It might be 4 and it might be $5\frac{1}{2}$. The smallest gravel wire screens we make of any type of construction would be ten mesh, No. 20, which is a woven screen. That is similar to the regular type crimp, double crimp screen. We use the double crimp construction type of screen up to and including from this 10 mesh, which is a very fine opening, I would say $\frac{1}{16}$ inch opening between the wire, from that opening to a $1\frac{1}{4}$ inch opening between the wires, No. 0 wire, which is $\frac{5}{16}$ inch wire. We use that range, all the different ranges between openings we are manufacturing with the double crimp type of crimp. Then beginning with $\frac{3}{8}$ inch wire and $1\frac{1}{4}$ inch opening, from there on using the larger size openings and the larger wires, we manufacture that on the flat

(Testimony of Karl H. Kaye.)

top type of construction. Very seldom do [92] we make as small as $1\frac{1}{4}$ inch opening with $\frac{3}{8}$ wire. That is a very heavy screen in relation to its opening. It is a very heavy duty screen. We don't make it very often. Generally speaking, our smallest screen of the flat top type construction is the $1\frac{1}{2}$ inch opening. We call our screen the Pacific 4-S screen.

Defendants' Exhibit A-9 is a wire that has a crimp for a finished screen that would have a $2\frac{1}{2}$ inch opening, and it is of a $\frac{1}{2}$ inch diameter wire. This wire is actually one that is a warp wire that has been crimped in making a screen for manufacture and our practice is to make them longer so that we can use them later for short wires, so that wire is either 3 or 4 feet long. I don't know which it is, but it will be one or the other so that it can be reused. The actual crimp in that wire is one that the rest of it was on here, it would keep right on going and the screen has actually been woven. We stack them up until we get another screen the same opening. That is a piece of wire that was left from a piece which was used in actual manufacture of a screen. That was taken from that bundle to bring up here. It wasn't manufactured for the purpose of this case. A-10 is a wire that has been punched so that when it is in a screen complete it will be a 3 inch opening with a $\frac{1}{2}$ inch diameter wire. This is a wire that is again the end of the warp wire which is the long wire if you are making

(Testimony of Karl H. Kaye.)

a screen. The warp is the long wire that has gone into your loom, and we make them sufficiently long so that we can use those wires for a warp wire in the future in a screen, the next order, when it may come, would be a 3 inch opening $\frac{1}{2}$ inch wire for that particular width. That way we save poundage of wire on the ends of our loom. This has been taken from a bundle. We bundle them up and rack them. It has been taken out of one of those bundles similar to A-9, except [93] a different opening. We do not keep on hand a stock of finished screens of the $1\frac{1}{2}$ inch opening, $\frac{3}{8}$ wire on up. We do keep a stock of screens in the smaller openings, for instance, on $1\frac{1}{4}$ inch opening, $\frac{5}{16}$ inch wire, when we make it with the double crimp. This is true of all the double crimp openings we use a lot of. We make those 100 feet long at one time as a rule. Then we cut off what we need and have a stock of certain widths that we find are the popular widths. So far as the screens concerned in this case, we do not keep a stock of screens on hand.

A-11 is a wire which has been punched for a two inch opening with a $\frac{3}{8}$ inch diameter wire. This also has been taken from a bundle that is the end of a warp wire that has actually gone into a screen, and has been crimped right along with the screen. There is no change in the depth of the crimp at all from the ones in the screen. It has been taken out of a bundle and has not been made as a special exhibit.

A-12 is a wire that has been punched that went

(Testimony of Karl H. Kaye.)

into a screen, $1\frac{3}{4}$ inch opening $\frac{3}{8}$ inch diameter wire. This also is from a warp wire that has actually gone into a screen. The rest of it has actually gone into a screen similar to before and is the same depth of crimp as went into that regular screen and has come out of a bundle that is in our rack that will be woven up in a later screen as cross wire.

A-13 is a wire which has been crimped for a $1\frac{1}{2}$ inch opening $\frac{3}{8}$ inch wire. This also is one that is the end of a warp wire and has been crimped just the same crimp right straight through, because naturally they don't change and they are going to put in the looms but leave it out so we have enough for the width of the wire. I do not believe that the slight bow in this from both ends is sufficient that it wouldn't come down into plane when it was woven. However, if it should be, we do [94] straighten these sometimes by merely putting them in a vise and getting the bow out. This happens to have a little more bow in than the others, but it is just as it came. It has not been altered in any respect. That change would not affect the nature of the arch.

A-14 is a sample of a wire which has been punched for a $2\frac{3}{4}$ inch opening with a $\frac{1}{2}$ inch diameter wire. That again is one that has actually been part of a warp wire. It has been taken out of the bundle and has actually been punched for a screen in a like manner to the others.

A-15 is a part of a warp wire that has been

(Testimony of Karl H. Kaye.)

punched for a finished screen which will have a 3 inch opening, and this is a $7/16$ inch diameter wire. This has been taken from a bundle of warp wire which has been punched and been used in an actual screen.

A-16 is a punched wire for a $11\frac{1}{2}$ inch opening $3/8$ inch wire and is one that has come from our rack. We have two of them here, I believe, of the same opening which have come from our rack, and is part of a warp wire and will be used later as a shot wire. That opening is similar to the size opening in Plaintiffs' Exhibit 2. When it is woven up it would make a screen similar to what is in Plaintiffs' Exhibit 2. This rod would be used in a screen with the same size opening, same size wire as No. 2. A-17 is a wire that has been punched for a $2\frac{3}{4}$ inch opening with $7/16$ inch diameter wire. This again is the end of a warp wire which has gone into a screen similar to the others and will be used as a shot wire. It has been taken from a bundle of like punched wire. A-18 is one which has been taken from a rack of $2\frac{1}{4}$ inch opening, $3/8$ inch wire, and likewise is the end of a warp wire which has been punched and has gone into a screen. It is identically the same indentations and all that [95] here in the screen itself. A-19 is one that obviously cannot be used as a warp wire again. This was the end of a warp that had just recently been made of a $11\frac{1}{4}$ inch opening, $3/8$ inch wire. That is the smallest size we ever make. Of course, it cannot be used again, but is

(Testimony of Karl H. Kaye.)

merely demonstrating that has gone into a screen. That illustrates the depth of a crimp, that is the exact depth of the crimp that went into that screen, because it is part of it. It was cut off right here. It illustrates the nature of the arch for that opening.

A-20 is a sample of a 2 inch opening, $\frac{3}{8}$ inch wire. This is the size of samples that we use. That is identical with the screens that we manufacture of that opening. The fact of the matter is that this sample was made from one of these long wires. We do that often in making these samples. We actually cut them up and use them for samples. This is one that was taken from one of those. The sample was put together out of the wire that went into a screen.

A-21 is a $1\frac{1}{2}$ inch opening, $\frac{3}{8}$ inch wire. That again is one that like all of our samples we use is made and that was made from a wire that was punched and went right into the screen. That accurately depicts what the screen looks like when complete. Right in this area here it does. The central area.

A-22 is a screen that is a 3 inch opening, $\frac{1}{2}$ inch wire. The fact of the matter is, I believe, we have got a 3 inch opening with $\frac{1}{2}$ inch wire right here. This is a single wire. This has been put together from one of those wires exactly the way it was punched. It was put together from a warp end wire. It is identical—it was just punched right with the regular screens. [96]

A-23 is a sample that has been taken directly out

(Testimony of Karl H. Kaye.)

of our sample case in the office and is a $1\frac{1}{2}$ inch opening $\frac{3}{8}$ inch wire. I cannot tell you how long ago that was made because that one is out of our sample case, because of this tag. It was not made for use particularly in this case. It was made as a sample for our office and has been there for some time, but we brought it here as one of our samples. I can tell from this tag. The opening in that sample is similar to the opening in Plaintiffs' Exhibit 2. This is a $1\frac{1}{2}$ inch opening, $\frac{3}{8}$ inch wire, and so is that. I didn't measure it, but I know it is. A-24 is one of the specialty types that we get occasionally, which is a long mesh. This is a $1\frac{1}{4}$ inch between the wires in the short distance and is 4 inches between these two points here, approximately, made out of a $\frac{3}{8}$ inch wire. That is what we would term a specialty screen that has been made for a customer's own specifications. This sample is the sample that was made up at the time the screen was made. We have samples of those, and this was one that was made up for that size opening. A-25 is a sample of a screen with a $2\frac{1}{2}$ inch opening with a $\frac{1}{2}$ inch wire and there again this sample has been made up from warp wires that have been used in the screen. It has been made up out of a warp wire. That is $2\frac{1}{2}$ inch opening. A-26 is a 2 inch opening $\frac{3}{8}$ inch wire and there again has been made out of a warp wire which would be similar to one in our file there and has been put together and made a sample of. It is identical with the screens of that type that we

(Testimony of Karl H. Kaye.)

make. The wire has actually been the end of a warp wire that went into a screen. A-27 is a screen with a 3 inch opening with a $\frac{1}{2}$ inch wire. It was made for order B-1949, which I believe the date is the early part of 1948. We have the mill order here, and the reason why it happens to be a finished screen, that is a finished screen as we call it for vibrating, the turned [97] up edges and on the other side that is what fits in a vibrating machine. This one was made for a Cedar Rapids vibrating machine. That is the name of a machine, one of the makes of machine, and it is clamped down in a machine by these hooks here and closes in tight. The reason why that is on there is the length of the screen was in error and fitted in 6 feet long instead of 3 feet long, so it was actually made two of them for shipment, and we have the plant copy, but because it was made wrong it never left the plant and has not been sold to anybody else. These types of screens that are illustrated by these wires and these sample screens are accurate examples of the types of screens that we manufacture and sell. They represent quite a wide range. You would have just some openings in between there. I see we haven't gone up to $3\frac{1}{2}$ or 4 inch openings, but it does give you quite a range between $1\frac{1}{4}$ inch, $1\frac{1}{2}$ inch, 2, $2\frac{1}{4}$, $2\frac{1}{2}$. It does not represent the entire range of our manufacture. You could have some other openings in there, anything between those. You can adjust that opening to any fraction of an

(Testimony of Karl H. Kaye.)

inch you want to within practicability of the size of your wire.

(At 5:10 o'clock p.m., Wednesday, October 19, 1949, proceedings recessed until Thursday, 10:00 o'clock, a.m., October 20, 1949.)

October 20, 1949, 10:00 o'Clock A.M.

At 10:00 o'clock a.m., October 20, 1949, Mr. Karl H. Kaye was withdrawn temporarily from the stand.

LESLIE UMSTEAD

called as a witness by and on behalf of defendants, having been first duly sworn, was examined and testified [98] as follows:

Direct Examination

In answer to questions by Mr. Catlett, the witness testified:

My name is Leslie Umstead. I reside at Port Blakely, Washington. I recently had occasion to take photographs of a screen in the Olympic Hotel in Seattle. The screen is located on the Seneca side, just opposite the entrance, on the sidewalk level, just slightly above the sidewalk level. I mean to one side of the entrance. It is on the right facing the entrance. It is a portion of the main part of the hotel. I took pictures of that screen. Defendants' Exhibit A-7 is taken from the side, showing the side view of it, where it would have to be taken partly towards it, because if you took it sideways—

(Testimony of Leslie Umstead.)

I don't know whether the grill extends out beyond the building or not, however, I had to take it at an angle to show the curvature of the grill. Defendants' Exhibit A-8 is taken right in front of the grill, from the sidewalk. These pictures accurately show the appearance of the screen, of the grill at that time as much as a camera can take.

Cross-Examination

In answer to questions by Mr. LeSourd, the witness stated:

I have no other idea, as to the purpose to which those screens are devoted, except for the protection of the glass, because being at sidewalk level, I imagine somebody could break the window or open it if necessary.

KARL H. KAYE

Direct Examination

(Continued)

In answer to questions by Mr. Catlett, the witness, Karl H. Kaye, testified:

(Photographs marked Defendants' Exhibits A-29, A-30 and A-31.) [99]

Defendants' Exhibit A-29 is a photograph of the front end of the press, one of our presses, with the die which shows a close-up of the die which we use to form the crimps in our flat top type construction screen, together with two actual wires being crimped inserted right in the die in the action

(Testimony of Karl H. Kaye.)

of being crimped. I am trying to make it as plain as I can. A-30 is a photograph of the same press with the head in the air before it has come down and made the indentation, made the crimp. It is the same press in a little different position. When I say head in the air, that is the terminology we give for the head of a press that pulls up and down. It is the press head that I refer to by the name of head.

A-31 is a photograph of a different press with the die shown and a wire in the die which has come down to make the crimp of a wire for a flat top. The two presses shown in the photograph, or the two punches, are both the same type of a die. One has an angle that we would term an angle on each side. The other has what we term a pad on each side of the main part of the die. That is the only difference. The purpose of the pad and the angle is to hold the wire down and to take out any of the formation of a curvature between the two crimps that normally could form and does form when you are cold pressing, also prevents the wire itself from getting into a natural long arc so that it keeps it flatter, the whole wire.

The procedure in the manufacture of screens is first the wire is rolled, straightened from the coil which it come in from the factory whom we purchased the wire from. When it comes from the coil, it has a very definite curvature of the coil and we do what we call rolling, straighten it. We put it through two rolls that take that curvature out

(Testimony of Karl H. Kaye.)

that is part of it, gets it fairly straight, don't take it all out but part of it out, [100] so that we can take those lengths—they are cut to lengths of the screen we want to make. Then we take those lengths and run them through our press. First the press is adjusted to the size opening we want to make, because it is an adjustable die, $\frac{1}{4}$ inch, $2\frac{1}{2}$, $\frac{3}{8}$, or we can use $\frac{7}{16}$ diameter wire, make a different opening out of that or we can use a $\frac{1}{2}$ inch diameter wire, all out of this same die. It is adjustable, so if we are making a screen out of, let's say, a 2 inch opening $\frac{3}{8}$ wire, as an example—however, I believe what is in this machine actually is $\frac{7}{16}$ wire. We adjust it. The die has to be adjusted first to that opening as far as the distance of the crimps are concerned. Then also the depth of the crimp is adjusted in relation to the size of the wire and also in relation to the distance that we are going to put these crimps in. Then the wire is inserted and it starts at one end and the press is brought down by its power and it makes the crimp. We can use one wire, in the real heavy ones we only put one wire through at a time. On $\frac{3}{8}$ inch wire we put three through it at a time, in this press, and $\frac{7}{16}$ and $\frac{1}{2}$ we put two through at a time. I think this has two in it—yes, it does.

As that crimp is made, the material is taken ahead to give that opening which we want to make, and the press comes down again. As the press comes down, the die itself, which is what they call—I guess a common term is a bridge die, because

(Testimony of Karl H. Kaye.)

there are two blocks in the bottom and one on the top—that comes down and makes this indentation or the crimp. The pads also come down with it and those are adjustable to the distance apart, because of the difference in the distance of the crimps and also to the depth because of the adjustment of the wire sizes. Then the entire wire is crimped. It is run through the press and is crimped. [101]

After we have crimped sufficient wires for the width of the screen that we are going to make for the warp, the wires are put in the warp. We generally run our warp wires either 3 feet or 4 feet longer than we are going to make for that particular order so that we will not have a normal waste end of about two feet that we couldn't use on this heavy wire. Then the cross wire—the warp wires are the long wires, the cross wire is the shot wire in our language of the industry—that is made identical, the same crimp, the same depth, and everything, as the warp wire, in fact, they are interchangeable. The warp wire or long wires are put into a loom through heddles, which means that one is raised and the other is lowered. It also goes through what we term a reed to get it accurate for the spacing between the wires.

Then the shot wire is put in and it is wove in with one wire up and one down in a basket type of a shape so that the cross wire is inserted in there and it moves ahead for the next one to go in. The heddles shift and the next wire goes in and so on, until the screen is wove up. The punch operates—

(Testimony of Karl H. Kaye.)

the wires are inserted in the punch, in the bed of the punch, and the mechanical part of the punch moves the head up a way from the wire. The punch consists of, as far as the die part is concerned, on the upper part of the die, the top part of the die consists of one die member which protrudes down, and the shape of that die member is tapered in relation to the diameter of our wire so that the formation in the wire will be approximately the diameter of the wire. It is rounded so that it doesn't make the square projection. It would be the male part of the die which comes down and makes the indentation which we refer to as the crimp. That is the center of the operation of crimping. On each side of that projecting unit that comes down on A-29 there is what we [102] call a pad. It is a piece of metal, fairly heavy metal, that is flat and is adjustable to heights by bolts at the top of the die block. There is one on each side of that male die. One on each side of the indentation we have referred to as the crimp. That is what causes the flatter portion here between the crimps, one of the things that it does. Underneath that portion of the die there are two blocks that are spaced so that when the top indentation die comes down, it forces it down between these two blocks, which creates the underside of that curvature. These two blocks are not directly underneath the pads. The pads are spaced farther from it. They are not directly above the bottom members I speak of. The pads are more to the right

(Testimony of Karl H. Kaye.)

and to the left. They are on each side of your crimp indenture, in fact that makes the crimp indenture, your contour, the crimp indenture on the under side. It is the female part of that side, the one on the top is what we normally call the male and the one on the bottom would be the female part of that die. There is a definite relation of the depth of this crimp and the size of your wire. We make a practice of the certain size of wire—it will be $1/32$ less than the die under the wire. The top side of your crimp will be down $1/32$ less than the total diameter of the wire, and that varies slightly, depending upon the spacing of these crimps, because the farther out you get or the closer you get there will be some variance, but we will run between $1/32$ and $1/16$, converting that into percentages of the total of the wire that goes in these indentures. The percentage of that, $1/32$ to $1/16$ less in the crimps, is worked out percentage of the total diameter of the wire. If it is $1/32$ inch less on a $3/8$ inch wire—this happens to be a $3/8$ inch wire we have there—it works out to be 92 per cent of the diameter of the wire, the $1/32$. The $1/16$ is 84 per cent of the diameter of the wire. That [103] is the transverse wire that is going to lay in this end, also the next one that comes in the other portion. This is a $1\frac{1}{2}$ inch opening, I believe. So, therefore, when we adjust—when a mechanic adjusts his press, he has to adjust the depth to this method that we use so that if he is making this size he will

(Testimony of Karl H. Kaye.)

have a slight variation in depth, and if that was to be a 2 inch or $2\frac{1}{4}$, approximately from $\frac{1}{32}$ to $\frac{1}{64}$, or 84 per cent to 92 per cent of the diameter of the wire.

When he adjusts that, he also has to adjust his pads that are on both sides because that comes down a definite distance, and so this pad in order to accomplish what it is there for, to take out any normal curvature that is formed, plus keeping it so that it don't just get quite a bow—in this wire this is a slight bow—but let's say we have quite a bow. These pads do those two things. He has to do that in comparison with the adjustment on the die, because the whole punch comes down that far and stops.

There is no relationship between the depth of this crimp and the circumference of the wire because it is the diameter of the wire. We are concerned about the depth that it goes into, not the circumference of the wire, and that depth presents the plane of what the deepness of that crimp is. In other words, if it is 92 per cent of the diameter of the wire, 92 per cent of that wire lies in the crimp. That is the depth of the crimp, so we establish a plane for that crimp, so our crimp plane will be a line drawn—if it is 92 or 84 per cent of the depth, that is the plane—it is drawn and that becomes the depth of the crimp and establishes that line, when it crosses this coming up, will establish the width of the crimp.

(Testimony of Karl H. Kaye.)

In answer to questions by the Court, the witness testified:

The space in the wire between the crimps is not formed [104] patterned in our dies so as to make it a true arch form. I am positive about that, very definitely. It can't be patterned. The space in the wire between the crimps actually takes on the form of the arch in one size of mesh more than others to the point for this reason. What is actually happening, if I can explain it this way, we have a crimp and this is the crimp where that plane crosses. This would be the end of our crimp right here because it will be a plane 92 per cent, if that is 92, or 84 per cent, but substantially right here will be our crimp. As you make that smaller, obviously the points between your two crimps—here is one crimp and here is the other crimp—the point between those crimps is going to come closer together, but it is the width of the crimps that come closer together. There will still be a little crimp there as you go out further. Extending the distance between the width of the crimp, as you go out farther, they become farther apart. I think we have a very good illustration here. The closer these crimps come together, which is this portion and this portion (indicating) come together in the same size wire, the closer you have an appearance of coming to an arch, because you are coming up this way. The further apart you go you have a greater flatter surface between because the crimps are spread out.

(Testimony of Karl H. Kaye.)

To illustrate that I will take the same size wire, if I may, and this is a 2 inch opening $\frac{3}{8}$, same size wire and this is $1\frac{1}{2}$ inch $\frac{3}{8}$. This is A-11, is a 2 inch opening $\frac{3}{8}$ inch wire. A-13 is a $1\frac{1}{2}$ inch opening $\frac{3}{8}$ wire, that is, it is punched for those openings. In this one are crimps, we put these parallel here. We see how much closer our crimps are in the 2 inch. Our width of our crimps, when we hold them up from this point to this point is practically the same, so what we have done is we have moved this one out to this point. When I say this one, I [105] mean the distance between the crimps. We have taken this crimp and moved it out to this point, so we have the same depth of crimp, so we have a result that we have between our crimps from this point to this point a larger surface that is substantially flat, and as we go out farther, if we make this $2\frac{1}{2}$, it become flatter yet. We have one that will bring it back in again.

We have Exhibit A-13 which has crimps in the wire that have been placed for a $1\frac{1}{2}$ inch opening screen. That is the distance between the crimp. The connecting link is the distance between width of our crimp. The width of our crimp is determined by the straight line, plane of the percentage of the depth of our wire. In other words, it will range between 84 per cent to 92 per cent of the diameter of the wire, will determine the depth of our crimp. Therefore, if you draw a straight line and get your plane, then you come where the con-

(Testimony of Karl H. Kaye.)

necting link crosses that line to get the width of your crimp. The width of your crimp are spaced for $1\frac{1}{2}$ inch opening. Therefore, the connecting link that is between the crimps in a $1\frac{1}{2}$ inch opening is shorter than the connecting link in a 2 inch opening of the same wire size, the $\frac{3}{8}$ inch wire, and that is shown on Exhibit A-11, which has been punched for 2 inch opening $\frac{3}{8}$ wide.

The depth of the crimp in Exhibit A-11 is the same substantially as the one in A-13. Therefore, the width of the crimp in A-11 is substantially the same as the width of the crimp in A-13, because we still have the same depth in both crimps, substantially the same depth, but because the crimps are for a 2 inch opening, the connecting link between the two links is farther apart. I mean the connecting link is longer, and therefore the space between the width of the crimps is farther apart and there is more flat surface on them.

Conversely, I will try—this is Exhibit A-19, which [106] is punched for $1\frac{1}{2}$ inch opening $\frac{3}{8}$ inch wire. The depth of this crimp in this wire—in A-19 is substantially the same depth as in A-13, and therefore the width of the crimp in A-19 is substantially the same width as the crimp in A-13, but the crimps are placed closer together because it has been crimped for a $1\frac{1}{4}$ inch opening $\frac{3}{8}$ inch wire. I am referring to A-19, while in A-13 it is crimped for $1\frac{1}{2}$ inch opening $\frac{3}{8}$ inch wire. Therefore, the connecting link in A-19 is shorter than the connecting link in A-13, between the width of

(Testimony of Karl H. Kaye.)

the crimps, so therefore the flat surface that appears in A-19 is thereby a little shorter than in A-13. The flat surface in a connecting link in A-19 is a little shorter than A-13 and therefore has a shorter flat surface. In fact, they almost meet. The two widths of the crimp are getting very close together. They haven't met, but they almost meet, to illustrate that.

In answer to questions by Mr. Catlett, the witness stated:

That is the smallest size we make. If the size of the mesh were reduced, your crimps would be closer together. If you make a small opening or mesh your crimps are going to be closer together. Therefore, the distance between the end of the width of the crimps or in the connecting link is going to be shorter and will come to the point where if the wire would stand it, those could actually meet, the two widths could actually meet there, the widths of the crimp.

In answer to questions by the Court, the witness stated:

Because there has to be a curvature of your depth of your crimp, those two meeting would have the appearance that there was a curvature in there, but it would be the crimps meeting together rather than curvature put into it. That curvature appearance be more obvious and convincing in a small mesh than in a larger mesh. Actually, there would be very short flat space there, but [107] it would

(Testimony of Karl H. Kaye.)

be very definitely more obvious in a small opening or where the crimps are closer together in the same size wire than if you spread them out, very definitely, because your flat place, of course, gets smaller when they are closer together and it gets farther apart when you make the crimps farther apart and the lengths of the connecting links longer. There are some manufacturers that would have a die that would hold or control the curvature of the connecting link, we do not have in our manufacturing process.

In answer to questions by Mr. Catlett, the witness stated:

Mr. Palmer, I believe, testified that they made the depth of their crimp approximately $\frac{2}{3}$ the diameter of the wire, which would be $66\frac{2}{3}$ per cent or thereabouts, it naturally has to vary a little bit off those percentages, but that is basically, I believe, his statement of what the depth of their crimp was. If the depth of his crimp is $\frac{2}{3}$ and ours is 92 per cent of the diameter of the wire, when you get to the point of the interlocking point in the middle of our connecting link—we had better scrap the interlocking point for a moment as it is a new term. We can illustrate what we mean by interlocking point with A-26, one of our screens. The interlocking point that I refer to in the connecting link is the point that is in the center between the two crimps where the transverse wire meets it and goes through it, where the crimp in

(Testimony of Karl H. Kaye.)

that transverse wire meets into that connecting link. There is a definite relationship and it is mathematical, it can be figured out very definitely and mathematically. There is a definite relationship between the depth of this crimp in relation to the size of the wire with what it is necessary to have where this interlocking wire comes through.

In other words, our depth, the way we make our screens, [108] is approximately from 84 to 92 per cent on a $\frac{3}{8}$ inch wire, so therefore it is the difference between 92 per cent or 84 per cent, or 16 per cent of the diameter of that wire is above the plane. When it comes to the interlocking point, there is that percentage of the diameter that has to go under that wire. The reason for that percentage, the reason why the depth of the crimp isn't the full depth of that wire, is that in order to hold the screen together at all there has to be a pressure there and that difference creates that pressure at this point; otherwise, it would be so loose it wouldn't stay together.

We have only $66\frac{2}{3}$ per cent depth at this point. Then you have to give some kind of clearance at the intersection there for that $33\frac{1}{3}$ per cent, and that percentage of $33\frac{1}{3}$ per cent is a great deal more than 8 per cent. It is 25 per cent difference, approximately, so therefore in order to get that wire under there you have about 25 per cent that you have to have some kind of a curvature or an arc to get it in there, because if it is made flat like our screens are, you couldn't force them in there with that difference. So there is a very definite

(Testimony of Karl H. Kaye.)

mathematical relation to it, and that mathematical relation is the difference between a flat link, connecting link, between the outside of your width of your crimps and a curved link, because you have to get that wire in there. You still have to retain a pressure on the wire. They do in the Palmer patent. They can't take all of the $33\frac{1}{3}$ per cent. They do have to retain part of it for pressure, just like we do, to hold it together.

In answer to questions by the Court, the witness stated:

There is nothing in the claims in the Palmer patent which fixes absolutely by any figures or formula the depth of the Palmer claimed shallow dent. There is something in our [109] manufacturing process which rigidly, definitely, unfailingly fixes the depth of the crimp. It is worked out to our own practice in our own plant. On a $\frac{3}{8}$ inch wire, we range from 84 per cent of the diameter of the wire to 92 per cent, depending upon the difference in the distance of the length of the crimps apart. There is a little variation there. There is a variation also because of a little difference in the temper of the wire. Wire itself, even made by your formula coming from the same mill, one shipment will be a little different than another shipment. It isn't uniform, so that there is that little variation.

On a $\frac{7}{16}$, it will run from 86 to 93 per cent. On a $\frac{1}{2}$ inch wire, it will run from 87 to 94 per

(Testimony of Karl H. Kaye.)

cent. That is the depth we put in there, to the diameter of the size of the wire that is used. If we put a deeper depth in there on a $\frac{3}{8}$ wire, if we went to $66\frac{2}{3}$ per cent, we wouldn't be able to get it through, because our connecting link is flat. We can only have enough in there so that we get this pressure that is required, the spring pressure that there has to be to hold it together tightly.

We do not put any curvature in the connecting link between the crimps. We do not have any definite arrangement in any manufacturing principle for determining the length of the radius in any curve or arch formation in the connecting link between the crimps.

In answer to questions by Mr. Catlett, the witness stated:

With reference to Mr. Palmer's product, and as to the effect upon the connecting link when the openings are extended to as much as 6 inches, as you extend the distance between your crimps, naturally your percentage—you have the same percentage of your wire, approximately that $33\frac{1}{3}$ per cent that we mentioned before or thereabouts, must be extended over a greater distance. [110] The $33\frac{1}{3}$ per cent I refer to is the difference between the depth of the crimp that they gave, was approximately $\frac{2}{3}$ or $66\frac{2}{3}$ per cent. Therefore, you have the difference of the wire protruding above that, which is $33\frac{1}{3}$ per cent approximately. Now, as you extend the distances between your crimps that you

(Testimony of Karl H. Kaye.)

still have only that same proportion of your wire, approximately, to distribute over instead of an inch and a half over, say, 3 inches. So, therefore, your curvature or that difference of that wire is distributed over a farther distance of the connecting links and becomes a less curvature, so that as you keep distributing that out to 4 or 5 inches, you get still less curvature because you have that same approximate percentage of difference in that wire.

In answer to questions by the Court, the witness stated:

There is more than one manufacturing process for the forming of the crimps and the making of the arches or shaping of the connecting links. There is a difference in dies, that is part of the forming of it, Your Honor, and I believe that the plaintiff testified that he used forming dies to form his arch. In that respect, his process of forming crimps and shaping connecting links is different from our manufacturing process. Your connecting link would be formed to the curvature. Ours does not form it to a curvature. Our die does not form it to a curvature. There is a natural curvature that comes into the cold wire when you form it, but it isn't the same, uniform, and therefore we also take that out, but our die does not put it in. But there is, in fact, the plaintiff said, I believe, that he used forming dies to form the curvature as well as the crimp. We do not.

(Testimony of Karl H. Kaye.)

In answer to questions by Mr. Catlett, the witness stated:

Referring to Plaintiffs' Exhibit 8, and explaining the double crimp with reference to the crimps and the connecting [111] links, on a double crimp as in Exhibit 8 there is a warp wire again and a shot wire. The warp wire is made with a slightly less depth of crimp than the shot wire. They are not the same depth. Again there comes into play the fact that in order to get a tight screen—which, by the way, this sample is not very tight.

In answer to questions by the Court, the witness stated:

That is the double crimp screen, Plaintiffs' Exhibit 8. This is one made by them. But it is common practice, ever since screens have been made, in order to make them tight, that your warp crimp wire will be slightly less than your shot crimp wire, and when it is woven together, the pressure created by that difference in the crimp depth makes a tight wire. This one could be a little tighter. I would say, if made correctly with the proper wire, proper spring wire, proper tensile and annealing of the wire, with proper strength and annealing of the spring wire applicable to that type of crimp, that it is possible to get a very tight screen, and my opinion would be that you could get one that would be as tight for all practical purposes as the other types of crimps, with possibly the exception of that shown in the Galloway patent, which has a sort of

(Testimony of Karl H. Kaye.)

lock for its crimp. The Galloway patent is more in relation to a flat top type of screen than a double crimp type of screen. That brings a sharper indentation in the wire where it crosses, so that it has a little more sort of a tighter locking surface.

In answer to questions by Mr. Catlett, the witness stated:

In order to point out as effectively as possible what I mean by the interlocking device which makes the Galloway patent tight, I would like to take as a sample one of the flat top type construction. We have no screen exhibit that exemplifies Figure 3 in the Galloway patent. I just wanted to use a flat [112] top to show what I meant by the interlocking device. If not, I can illustrate it by word, I believe.

(Wire screen marked Defendants' Exhibit A-32 for identification.)

I might add that double crimp screen is a very definite relation in the size of the opening. It would be impractical to use a double crimp construction for a larger opening like $1\frac{3}{4}$ inch or even possibly $1\frac{1}{2}$ inch, although it can be used on that, but when you get into the larger openings, the double crimp screen as shown in Exhibit 8 does not become as practical as other flat top types. That is sometimes when the flat top comes into being, so in all these types of crimps, there is sometimes a limitation both ways. Conversely, the flat top cannot be used very successfully in some-

(Testimony of Karl H. Kaye.)

thing that is smaller than $\frac{1}{2}$ inch opening, so there is a point by which both of them have their limitations, so you can't just use one description to cover the whole opening.

The definition of the art of a flat top screen is that the crimps are all on one side of the screen, and the other side, therefore, is without any crimps on it and is substantially smoother, flatter. In my opinion, the Palmer patent is a flat top type because the indentures, crimps, are all on one side, and the arch, which is a slight curvature, is on the top side and there is no crimps on the top side so I believe that that follows what I would consider a flat top type of construction screen. That is the definition of flat top which is common in the industry. I would say that the Galloway patent was a flat top type and I am not alone in that. Others have said it, too. I believe in our depositions some others say that it isn't so. The Potter patent is the flat top type. With regard to the interlocking provided by the Galloway patent, in Plaintiffs Exhibit 11, [113] Figure 3, you find that the figures 5 and 5 show the main crimps. Those are the main crimps between the two wires, similar to flat top in, say, A-16. Those figures would be the same as 5 and 5, would be exactly the same as in A-13, the two crimps. Those are the main two crimps and they are all on one side of the screen, as you will notice. Then 7 and 7 are the cross wires that meet in here, and instead of having just this crimp be the sole locking device, where the

(Testimony of Karl H. Kaye.)

transverse wire goes through it, they have put in an additional short crimp in this portion here so that that wire can lock itself in there a little more than right on the surface that is flat with the crimp itself.

Those short crimps are the number 7 on figure 3, and the effect of those is to lock the transverse wire which is number 8 on figure 3. Number 5 is also a transverse wire on the lower side. I would say that would be the lower side of the screen. No, I beg your pardon, I am wrong. I would say that was the upper side and the transverse wires 8 would be on the lower side.

In answer to questions by the Court, the witness stated:

They are both transverse or cross wires, but there is what we call a top side to this screen and a bottom side. Figure 2 illustrates it better. Your top side of that screen, which the gravel would go over, would be the side that shows number 5 and 5 on it. That is the top side. Number 8 and 8 are on the bottom side, and have been locked in tighter because of that additional crimp as shown in number 7. The 7's are the additional. Figure 6 is a cross section, using a comparison of a flat top type of construction with a double crimp. They are two different things. Figure 6 is a different type from Figures 2 and 3. With regard to whether it is different from the plaintiffs' and defendants' double crimp style of screen, that double [114]

(Testimony of Karl H. Kaye.)

crimp style is the same. It only runs one way of the screen. The actual screen is different from a double crimp which is double crimp both ways. It is different from Exhibit 8, yes, because the screen has the one wire, is based on a flat top type of construction, and the other wire is based on a double crimp construction. It is a combination. In Figure 2 of the Galloway patent, the identifying Figure 7 is the extra crimp that otherwise—if that was straight across, you wouldn't have any crimp, as it would be just straight across. Number 7 in Figure 2 is a designation for that crimp. The Figure 7 is the top side of the crimp. You can have a top and bottom side of the same crimp, and that happens to be the top side of that crimp. Figure 6 on the sheet of drawings attached to the Galloway patent is a double crimp, but the opposite way, it isn't a double crimp. The other wires, as in Figure 5, don't show the double crimp. It is a combination. There is no physical sample similar to the illustrative figures 2, 3 and 5 on the sheet of drawings in the Galloway patent.

If we refer to Figure 2 in Exhibit 11, the Galloway patent, the number 3 and Figure 2 is the main crimps in that screen. Number 7 in Figure 2 is the interlocking crimp. The transverse wire, number 8 and 8, is not the locking crimp of number 7. That wire is on top, and the wire shown as Figure 8 and 8 is underneath that wire and there is a crimp there as shown by 7 and 7 instead of—if the crimp

(Testimony of Karl H. Kaye.)

wasn't there, it would be as in our Exhibit A-26. If the crimp wasn't there, it would be without a crimp. It would be similar to this point, the crossing point in our Exhibit A-26. Galloway instituted an additional crimp as shown as number 7 in this Figure 2 at that point, and it is shallower than the main crimps of 3 and 3 to merely put an additional hold on that transverse wire at that [115] point. Figures 3 and 3 would be similar to our crimps in Exhibit A-26, this crimp and this crimp, this crimp on the one side of the interlocking wire and this crimp on the other side. He has put into his patent that additional crimp.

In answer to questions by Mr. Catlett, the witness stated:

Defendants' Exhibit A-32 is a flat top type of screen of one of the smaller sizes. That screen is made by the Abbey Scherer Company, El Monte, California. To illustrate there the interlocking principle, we have two main indentures or crimps at equal distances apart, and the transverse wire is in the center with the same crimp in it. All of the crimps are on one side and when that is put together, the depth of the crimp——

In answer to questions by the Court, the witness stated:

The connecting link in Exhibit A-32 and the connecting link in Plaintiffs' Exhibit 10, Figure 1, is identical, substantially identical. Defendants' Exhibit A-32 involves so far as the connecting link

(Testimony of Karl H. Kaye.)

is concerned the same principle as the Potter patent. In order to make this screen so that the interlocking wires will not move, there again we have a principle that the depth of the crimp must be in relation to the wire.

In answer to questions by Mr. Catlett, the witness stated:

I am familiar with the principle of manufacture of the flat top type of screen. The only type of screens that we do make are those under the principle of the Potter patent. In order to get a tight screen, there will be a definite relation between the size of the wire and the depth of the crimp, and that relation will be smaller—the depth will be somewhat smaller than the diameter of that wire so that when the screen is wove, the transverse wire will have a definite point of contact there with pressure, and the difference between the depth of that crimp and the diameter of the wire creates the pressure [116] at the intersection of the transverse wire. We need the pressure to hold the screen together, first; and, second, to make a tight screen and one that the wires will not move.

It is possible to make a tight screen of the flat top type out of high carbon wire, high manganese content spring steel wire. It is so possible using the cold manufacturing process. I have tested the strength of the screen I have in my hand. In my opinion, it is a very tight screen.

(Testimony of Karl H. Kaye.)

(At 12:05 o'clock p.m., Thursday, October 20, 1949, proceedings recessed until 1:30 o'clock, p.m., Thursday, October 20, 1949.)

October 20, 1949, 1:30 o'Clock, P.M.

In answer to questions by Mr. Catlett, the witness stated:

With regard to the effect the weaving has upon the crimps and upon the link between the crimps, on the double crimp screen the warp wire is—the crimp in the warp wire is a little shallower than the crimp in the cross wire or shot wire, and when that is woven there is a pressure exerted there to hold the screen. The reason why the two crimps are not equal, it exerts a certain pressure where the interlacing wires cross and therefore as that pressure is exerted it can vary that crimp slightly because there is a pressure there. The pressure is necessary to hold the screen together and keep it tight, but it will when you drive up your loom, keep that shot wire in place. It will have a tendency, that pressure, to change that crimp slightly in the warp wire.

I am telling about the effect of weaving. Now, to get that tightness in a flat top type of screen as we make the crimps being the same, both in the warp and the shot wire—[117] there is another way of describing that wire, the weft or the woof. It isn't used for screens of this type as much as it is cloth. In the flat top type of construction, the

(Testimony of Karl H. Kaye.)

way we make it, our crimps are the same in depth, both the warp and the shot wires, therefore the tension that you have to give to the screen, that would be the same as in the double crimp. Where they have changed the depth of the crimp is in the difference between the depth of the crimp and the diameter of the wire, and in our case it ranges from $1/32$ to $1/16$ shallower crimp than the wire, or in percentage 84 to 92 per cent of the wire is the depth of the crimp.

When the cross wire is driven into that warp and it gets to the intersection just like in the double crimp wire, there is a pressure brought to bear and because you have that slight difference of the size of the wire from your depth of your crimp, and likewise in driving it up, you might at that point very likely distort slightly the connecting link between those crimps similar to what is done in the double crimp wire, so that if it had been flat before, it wouldn't be flat thereafter. That is, there could be a distortion where those wires cross each other. That weaving practice is known to the art ever since they wove wire screens.

I have been in other plants manufacturing these wire screens. I have been in quite a few. I have been in John A. Roebling's plant in Trenton, New Jersey, and Roebling, New Jersey. There is one in Trenton and one at Roebling. I intend to indicate that there are two plants. They don't weave wire screen in both plants, but I have been in both plants. They weave the wire screen in the Roe-

(Testimony of Karl H. Kaye.)

bling, New Jersey, plant, I made that trip every year for the last five years or so, with the exception of last year. In fact, I have been back there just recently. I have been in the Wickire-Spencer Steel Company at Clinton, Massachusetts. I have been in the Newark Wire Cloth Company's plant at Newark, New Jersey. Do you wish me to state just those that apply to this type of screen or general wire cloth plants? I have been in Abbey Scherer's plant in El Monte, California. I have been in the California Wire Plant in Oakland, California. I have been in other plants that weave wire cloth, not necessarily spring steel, such as insect screen cloth, the American Wire Fabrics Company at Mt. Wolf, Pennsylvania, the World Asbestos Company at Paterson, New Jersey, which was weaving insect screen cloth. I have been through the Manganese Steel Forge plant in Philadelphia. Several of these are large manufacturers of the wire screens such as we have in discussion here, including John A. Roebling's Sons Company, for one. Abbey Scherer Company in El Monte is one, California Wire Cloth Company in Oakland is another, Wickwire-Spencer Steel Company in Clinton, Massachusetts is another. Incidentally, that is the division of the Colorado Fuel & Iron Company which they call the Wickwire-Spencer Division. The Ludlow-Saylor Wire Company is a large manufacturer of this type screen. I have not been to that plant. The Olympic Hotel was built around 1924 or 1925, right in that period. The

(Testimony of Karl H. Kaye.)

main part of the hotel was completed at that time. I am familiar with the grating or screen which is on the outside of the Olympic Hotel, the lower floor. That is a type of screen or grill. It is a very heavy grill, probably made out of $\frac{3}{4}$ or one inch diameter rod, and is made of a similar construction of a flat top type of weave, with the necessarily shallower crimp and the interlocking between the crimps has a rather pronounced curvature in it. Defendants' Exhibit A-7 correctly and fairly represents the way in which that screen looks, taken from a side view. I recognize it as [119] being the screen in the Olympic Hotel that I saw. Defendants' Exhibit A-8 presents a front view of that screen. There is a very definite similarity, in my opinion, between the arch in that screen and the arch in Mr. Palmer's patent.

I am familiar with the state of the art of woven wire screen making prior to August 2, 1932.

In answer to questions by Mr. LeSourd, the witness stated:

My occupation prior to 1933 was that when I left the University of Washington, my principal occupation up to 1931, at the time my father passed away, was in the investment business. That wasn't my first time in the wire screen business. I was in the plant when I was 13 or 14 years old. When I was in high school, I worked there every summer. Other than that, the date when I first went in the plant was in 1931, I would say the latter part of 1931. I can definitely give you the date from

(Testimony of Karl H. Kaye.)

memory. My father passed away on December 3rd, 1931. That happens to be my birthday.

I became familiar with the state of the art prior to 1932, having worked in the plant from the time I was 13 or 14 years old to the time I was 18 years old and then I went into the service; and also having been brought up in a family that my father was associated with the same company since my birth, which goes back to 1899, I naturally over the course of years assimilated some knowledge of the wire weaving business by actual weaving it myself as a helper and a crimper in working in the plant, and also hearing the discussions pro and con about the various arts of making things and also observing some of them.

With regard to whether my experience was simply assisting as a boy in the plant, if you call a man 17 or 18 years old as a boy, why, I would say that I worked on looms and I did actual physical work in the plants. I have set up crimps and I [120] have done actual physical work. My experience at that time was confined to the products of that particular plant, which covered quite a range of things besides just making screens. It covered wire cloth, and not only that but it covered ornamental wire work such as bank grills. I have had experience in plating. We plated a lot of bank grills in those days, electroplated them and wove them and framed them, and such like as that, partition work and such as that. It covered more than just making a wire screen.

(Testimony of Karl H. Kaye.)

I don't believe I testified on direct examination that my firm did not make gravel screens prior to 1933. I may have testified they didn't make them out of spring steel wire, but they still make gravel screens.

In answer to Mr. Catlett, the witness stated:

I have had an opportunity since that date to become acquainted with the state of the art prior to 1932. The shallow crimp was known to the art at that time. The arch was known to the art at that time. We are successful in making screens of the flat top type which do not shift. We do not have any difficulty with the screens that we make and sell on that. Our customers attest to that better than I can, but if a screen is made properly, proper tensions in it, proper depth in the crimp, tightness, the screen is going to give very satisfactory wear.

In answer to questions by the Court, the witness stated:

In our screens we depend for locking on the tightness of the screen and the indentation that is on the interlocking wire. The principle is determined by the depth of our crimp in relation to the size of the wire. The depth of a crimp is determined by approximately a variation of from $1/32$ to $1/16$ of the diameter of the wire that is used. On a $1\frac{1}{2}$ inch opening, $\frac{3}{8}$ inch wire, flat top screen, the indentation or crimp of that screen will be [121] approximately from 84 to 92 per cent of the diameter

(Testimony of Karl H. Kaye.)

of that wire, the balance of it from 16 to 8 per cent, and the reason why there is a variation there that I can't give you, it is always 92 to 84 per cent, is because of the variance of the wire itself, in the hardness and softness of it.

That leaves approximately from 16 per cent to 8 per cent of the diameter of that wire protruding above the depth of the crimp. The wire sets in there. If the crimp is 92 per cent of the depth, there is 8 per cent still above that depth so that when the interlocking wire comes into place when it is woven, and there is also that indentation in that wire, that is that same depth from 84 to 92 per cent of the diameter of the wire, so that that difference of 8 to 16 per cent exerts a pressure against the straight interlocking link, and we rely upon that pressure plus the indentation or crimp that is in the wire itself to hold that in place.

When you get a wider screen, you could only use that if you took that $1\frac{1}{2}$ inch out, and you went clear out to 3 inches or $3\frac{1}{2}$ inch opening, we would use a larger size wire to get a little more strength in that screen than we would a $\frac{3}{8}$. You have to balance the size wire, so to speak, with the opening as well. One size wire will not be universal for all openings and make a good tight screen, so we balance it off in different openings, by different size wire, but we use the same basic principle of holding that wire.

(Testimony of Karl H. Kaye.)

In answer to questions by Mr. Catlett, the witness stated:

Exhibit A-30 is a photograph of one of our presses that we use in forming the crimps. This is a photograph of a single punch.

In answer to questions by the Court, the witness stated:

One feature of that press, more than all other features, [122] is emphasized by this photograph and that is the forming die that we use.

In answer to questions by Mr. Catlett, the witness stated:

Defendants' Exhibit A-31 shows a press also that has the main feature showing a die for forming wire for flat tops.

(Die marked Defendants' Exhibit A-33 for identification.)

Defendants' Exhibit A-33 is part of a die, what we call a double die for crimping $1\frac{1}{2}$ inch opening $\frac{3}{8}$ wire.

(Die marked Defendants' Exhibit A-34 for identification.)

A-34 is part of this die, the rest of the die, A-33, I believe it is. This is the top part, the male part as you might want to call it, and the other, A-33 is the female part. This being the top part of the die on the top of the press, this fastens to the press by these bolts. I mean Exhibit A-34 fastens to our

(Testimony of Karl H. Kaye.)

press by these bolts. When the press comes down, the wire in A-33, the female part of the die, is also fastened to the bed of the press. The wire is fed through, $\frac{3}{8}$ wire is fed through. The press comes down. These are centered so that the press comes down and forms two indentations or crimps at one time. The wire would be laying in here and this forms an indentation and this one forms an indentation for a $1\frac{1}{2}$ inch $\frac{3}{8}$ wire. We have shins and pads. These shins are pieces of metal, as we call them, they are there so that they can get some variance up and down to change the depth of the indentation in accordance with the wire.

The flat portions on A-33 forms the bottom side and also has a tendency of flattening out the curve that comes into it naturally when the top comes down and hits on a plate here. By the forming of it itself, it forms a natural curvature in it. That die is not designed to produce any predetermined curvature. [123] It is designed to take it out, not to put it in. That is not the same die as in A-31. 31 is a single punch die and this is a double punch die. I don't believe we have a photograph. We brought the die itself of the double punch.

Our process of manufacture does not produce on each rod a plurality of uniformly curved elongated arches. Our connecting links wouldn't be absolutely uniform. They will be as to length, very closely, but not as to its straightness, if that is what you have reference to. Referring to Defend-

(Testimony of Karl H. Kaye.)

ants' Exhibit A-5 which was attached to Mr. Lipincott's deposition as a sample of the screen being manufactured by Roebling, it is very comparable with our screen, A-21. It is very similar both in depth of crimp and in the status of the links between the crimps.

These manufacturers to which I have referred manufacture screens of the flat top variety. That screen of Roebling's is of the flat top variety. In our manufacture of screens we endeavor to flatten the connecting link because we wish to eliminate as much of the curve above our mean plane as possible. The amount taken out in that fashion can vary because your wire varies a little bit, the hardness and softness of the wire will vary slightly and therefore in one coil of wire, in the same coil of wire.

In using this double punch press, a sort of an arch will necessarily result between the two presses when they come down in a double, more so than in a single with the die that we have. I do not consider that the arch in Mr. Palmer's patent is a desirable feature because it puts a projection above the mean plane that allows it to wear more rapidly when in use and to offset that I do not believe he has enough advantages in it, particularly when he gets out into larger openings. Again, a screen might be better for one or two openings, and not so good for other openings, but we are speaking now, I presume, of the wider [124] range of open-

(Testimony of Karl H. Kaye.)

ings in general. When I mentioned a wide range of openings, we have a range of openings that we go as a manufacturer, $1\frac{1}{4}$ inch opening $\frac{3}{8}$ wire on to 4 or $4\frac{1}{2}$ inch opening $\frac{5}{8}$ wire. That plaintiff, I believe, he stated he started this flat top type of construction in a $\frac{7}{16}$ opening, if I am correct in that, I may be off a little bit, and then goes out to a 6 inch opening.

My contention is that there is a wide range of openings. Our range of manufacture is less obviously than the plaintiffs' range because he starts at $\frac{7}{16}$, and what might apply to inch and a half, in answer to your question of whether the wearing of that portion over a mean plane is beneficial or less beneficial, changes in the different openings as you spread it out. For instance, as you go from a $\frac{7}{16}$ opening and you finally get out to a 6 inch opening, you have got quite a range of a continuous arc, because those things become—the indentations become quite far apart on a 6 inch opening, it becomes 12 inches apart. Obviously, he don't use the same size wire on a $\frac{7}{16}$ or 6 inch opening, but he still has a very wide spread for his arch and the utility of it, as far as I can see, in my opinion, changes as the openings change. As you get it farther out, there is less utility in an arc.

We claim and I feel that in an $1\frac{1}{2}$ opening screen, as we start on $1\frac{1}{4}$ inch, that definitely has no definite advantage to one without it, such as ours, because our interlocking wires are very close

(Testimony of Karl H. Kaye.)

together, very rigidly held if made properly. You can make both of them wrong, too. The mere fact that you are talking about making a screen one way or another does not necessarily follow that you have made a good screen either way. You have to first make it a good tight screen in either way.

With regard to the utility of his invention so far as [125] giving support to the transverse wire is concerned, as you get out farther in your opening, you have obviously less support in it because your arch becomes more elongated and less of an arch and there is less support in it, and in a smaller opening I question that you need that arch to support it. We find we don't. We get a good opening, hold its position, because it is close enough together there without any curvature arch, but we do have that difference in our—there is pressure there. There has to be pressure there to hold it together.

Exhibit A-1 is a drawing for a die to make a high low crimp for a $1\frac{1}{2}$ inch hole $\frac{3}{8}$ inch diameter wire. He has one that is designated as an old style and one that is designated as a new style. The difference between the old style and the new style is that one apparently becomes more efficient in that they can make more indentations or crimps at one time with a little larger die, and makes a little more indentation. That has a bearing on the state of the art in the period when that was designed. The high low crimp has several different types, shows

(Testimony of Karl H. Kaye.)

that it has been in use. Well, this was designed in 1925 and the date that is on this one drawing here, the old style, is October 27, 1931. It shows that in place of the double crimp that they have changed it to the point where there is a lesser indentation than what would be in an extension crimp and therefore has more of a locking situation, and also demonstrates that there are different circumferences of a crimp made at the same time.

Defendants' Exhibit A-2 is a drawing, there are two here also. One is marked old style roeflat, designed 1932, and new style dies roeflat, designed 1932. The old style shows a drawing of a die whereby four indentations are placed in the wire for a flat top screen. The spacing between the crimps is inch and $\frac{1}{8}$ space, .312 wire. It shows in this die a very similar construction [126] of a die that we use, with the male and female part forming the indentation and along the side of the top male part and in the center of the connecting link is a projected piece of metal that takes out the curve that would normally form in that connecting link when you punch it down. This die is not adjustable. They could only make out of it, as far as I can tell here—I don't believe, without going into it further, that there is any adjustable part of the die to make a different opening with a different wire. It doesn't look to me like it, without examining it further.

However, on the new style changes—well, that

(Testimony of Karl H. Kaye.)

is to make a flat top to put on the new style, they have improved their die to the point that what became the top or male part of the old style is now on the bottom of their die, and what was on the bottom is now on the top and therefore when the press comes down, it makes the link between the two crimps, is forced down apparently on a plate on the machine so that as that die apparently comes down the press comes down, the curvature that has been formed is also taken back out again when it finally sets itself down on the die.

Then they have in addition to that what they call the nicker tooth. That is adjustable, and I don't know whether the die is itself. I haven't examined it close enough, but this nicker tooth apparently puts a nick in the wire at the point where the intersecting wire would come in to be woven into that point. That is the difference between the two dies. One is the new style, it is undoubtedly an improvement. I see that the contour of the teeth in the dies are changed a little bit. That is a drawing for one of their dies to make a flat top type construction screen.

Defendants' Exhibit A-3, there are two again. One is new [127] style and one is old style, designed in 1935 for a roeslot screen. Roeslot is a die that makes a long mesh screen; that is, the openings are not square as in the samples that we have here. We have one exhibit here that does have a long slot in it, I take that back. What is the number of our exhibit with the long slot, Mr.

(Testimony of Karl H. Kaye.)

Catlett? I refer to A-24. This die does not make it exactly like that, but that is what we call a rectangular opening between the wires. However, this design of their die shows in place of the one wire that is in A-24, that there are three wires inserted in there, and the portion in between—those are spaced very closely together and the portion between those two sets of crimps are 4 inches. Their terminology of the construction, however, is a roe-slot screen. Then the improved style shows 3 wires and the same type of a long mesh screen, changes the die for an improvement over their method of doing it in the old style. It is still made, this, however, is made again in the reverse. The two that were on the top in the old style, the two teeth in the die, are now on the bottom and the three that were on the bottom are now on the top, so apparently it is the same as in the new style, the one that the wire between those crimps lays in, makes them flatter than it appears in the old style, but there are three shot wires that are spaced very close together. The next one is a long straight wire which is in the other drawing 4 inches apart and the other drawing is 2 inches apart.

Defendants' Exhibit A-4 is a flat roeslot design screen which is very similar to A-3, other than they have taken the three wires, because those that appear on the top on one side one time, and the next time there is two, and they have put them in a flat plane with the flat space between the crimps. That

(Testimony of Karl H. Kaye.)

is an improvement apparently over their C but the rest of it is similar design. [128]

These contain principles similar to the principles I am using in my manufacture, very definitely, on A-2 before his new style. The old style die is what we are on, a single die. They are on a multiple die, but the principle is very similar. The teeth are very similar and the block to take out the curvature that normally forms in the wire is quite similar. Ours is adjustable and theirs isn't. Outside of the double die of another exhibit, that isn't adjustable.

In my judgment the Palmer patent does not contain anything which was new to the art, not known at the time when that patent was issued. Manganese steel is a form of a high type of steel.

(Catalog marked Defendants' Exhibit A-35 for identification.)

A-35 is a bulletin No. 230 of the Managanese Steel Forge Company, Philadelphia, Pennsylvania. It carries a copyright date of 1931. That catalog offers for sale and advertises screens made from manganese steel wire. It offers a screen of manganese steel wire and of a high carbon content wire 1 to 1.4 per cent, carbon 11 to 14 per cent, manganese. Low carbon wire is defined as something below .35 carbon, I believe. I believe that came out in the testimony here. You can not make a flat top type successfully with low grade carbon wire. That depends upon the purpose for which

(Testimony of Karl H. Kaye.)

you are to use it. It does depend on what the use is and the size of the rod, of course, that is used. I had reference there to aggregate sizing screens. In my judgment, Mr. Palmer's patent is not an improvement over the Potter patent. I have seen screens manufactured by Mr. Palmer during this period. In my opinion, I do not believe he is putting as much arch in as he did previously back in—screens that I have seen that he made in 1932, '33, or '34, and even some that we have purchased in 1940. I believe his earlier screens had more of an arch in them. [129]

Generally, I would say I cannot determine the manufacturer of a screen on this type by looking at it. I say generally, there is one that I can, an exhibit here, because of certain definite marks that are in the wire itself from the way the machine marks it. That is Exhibit A-32. A-32 is made by the Abbey Scherer Company. This particular size, and the small size, he uses what he calls a press roll instead of a press as we have been discussing it, for the heavier, the stand up press, and on his press roll certain indentations are actually put into the wire, pressed into it, that occur in there on the top side. There are sort of little X's. I happen to know that is on his rolls. I have seen them. In that respect, I could identify his screen unless some other manufacturer used the same type of a roll between these indentations on his press roll. I would not be able to identify any of the other

(Testimony of Karl H. Kaye.)

types of screens that are exhibited here from any markings on the screen. From the character of the article itself, the shape, I couldn't state that it was actually made by the manufacturer. Presumably, we would say that a manufacturer under the Palmer licensee patent—you might be able to identify that, but you wouldn't know whether it was Western Fence or some other licensee, if he had any more. Then I can identify from the marks of the Roebling screen, particularly as against our own. I mean if I didn't see tags on them, I couldn't identify that exact manufacturer.

Cross-Examination

In answer to questions by Mr. LeSourd, the witness testified:

The only type of flat top screen that we make is under the principle of the Potter patent, not the only type of screen. The only type of flat top screen. It is similar to the Potter patent, not under the Potter patent. Similar to the design of the Potter patent. We are not licensees under the Potter patent. That patent has expired. It isn't necessary to take a license to [130] make the Potter patent at this time. Our flat top screen is very similar to the Potter patent. We are making some screens with a double crimp. It is not true that those screens were the screens of less than $1\frac{1}{4}$ inch opening. We even make some $1\frac{1}{4}$ inch openings of a double crimp of a certain size wire. In fact, we even make some $1\frac{1}{2}$ inch openings, sometimes, on

(Testimony of Karl H. Kaye.)

certain size wire of a double crimp, but not very often. In gravel screen from $1\frac{1}{4}$ inch $\frac{3}{8}$ wire on out, the larger sizes, larger wire are the flat top type construction. They are all similar in design to the Potter patent. The Potter patent is as flat as manufacturing process can make it flat. Because you first have to define where the arch starts and where it doesn't start there is a—first you have your crimp and then you have an interlocking link or connecting link between the two crimps, and that link, connecting link in the Potter patent is essentially flat, as flat as generally manufacturing process can make it flat. The Potter patent does not have an arch between the crimps. First you establish your crimp and then you have your connecting link between your crimps, and it is made substantially flat.

With regard to whether or not the links between the crimps of Plaintiffs' Exhibit 2 are flat as shown in the Potter patent, well, the Potter patent, the crimps in the Potter patent are a little different than the crimps that we make. You can have a deep crimp or a shallow crimp. We are talking about the connecting link between where the crimp ends and where it begins. As to the difference between the crimps on the Potter patent and the crimps that I make, they can be—you can make them a little shallower or deeper, you can curve them out more or under. Our crimp is a little different than the crimp as shown in Potter's Ex-

(Testimony of Karl H. Kaye.)

hibit 10, the drawing in figure 1. The difference is that our crimp is a little wider, a little more elongated here. I can't [131] actually tell without a ruler and defining how much depth he has here in comparison with one wire off of this, but his crimp comes up more this way and ours spreads out more so that our crimp is from here to here, practically. His crimp comes up more abruptly this way, more of a curve and then goes over. His crimp is not quite as wide as ours, let's put it that way. I don't know whether our crimp is more shallow than the one shown on the Potter patent. I couldn't answer that unless—the crimp don't necessarily have to be more shallow, to be wider. You can still have the same depth in it, but unless I would know the percentage of his depth to the diameter of this wire in this drawing, I couldn't answer that. I know what it is in ours, but I can't answer what it is in this drawing. But you couldn't have the same depth with a wider crimp or a closer crimp and still retain the same depth in it, I believe. On certain size wire, our crimp is within approximately the range of 84 per cent to 92 per cent of the diameter of the intersecting wire. In measuring the depth of a crimp with reference to Plaintiffs' Exhibit 2, first you establish the diameter of your wire. Your depth then is going to be approximately 84 per cent, or in that bracket. Part of this wire from there up to that line that would be drawn—not necessarily a line drawn between the

(Testimony of Karl H. Kaye.)

tops of the two arches on each side, it won't have to be on the top of anything. If this is 84 per cent of the diameter of the wire, then the depth of that, if you take 84 per cent of the diameter of a $\frac{3}{8}$ wire, and that depth is that and you draw a line from that depth, you will come out here to a point where we say our crimp then begins, and the connecting link connecting those two crimps together starts. To tell what that point is on Exhibit 2 I would have to draw it all out. I can't do that on—you can't just hold a piece of paper up there and determine that. [132]

In punching our screen for the various openings we run between a range of percentages because of the difference in the wire because each screen isn't identical with the softness or the hardness of wire. There is a little more spring in some, not as much in others of the same wire with the same manufacture, so that we work within a percentage of the diameter of the wire and we set our punch die accordingly. That percentage, as I say, will vary. We set the depth of it. Our crimp is put in there by our die block which isn't changed. If I can use our exhibit where we have a picture of our die block, I think I can explain it to the Court, that that part is in there and the depth then regulates how far that punch is going to make that crimp.

There is a crimp on Exhibit 2. To measure to determine the depth of that crimp you get your mean plane of this wire. We assume that we have

(Testimony of Karl H. Kaye.)

used 92 or 84 per cent. To measure the depth of the crimp on Exhibit 2, you can take the plane out here. You can take the top of the wire. The top of the intersecting wire to the point of the percentage I am telling you and draw that out. To measure on this exhibit the depth of the crimp without assuming an arbitrary percentage, you would take your plane and measure your depth. In answer to the question, "You take the plane across the top of the arches," I said approximately. You can't do it definitely. To determine that from the screen you have to measure this point out here, you have to come into a plane. You can assume, if you want to assume as a starting point the top of the wire. I wouldn't say top of the arch. I said top of the wire, of $\frac{3}{8}$ wire and say that we were punching that down to $\frac{3}{8}$ thickness. $\frac{3}{8}$ wire is a $\frac{3}{8}$ wire presumably. We don't punch it down to $\frac{3}{8}$ wire because in general practice screen manufacturers know that you have to have some just like in a double crimp screen, one crimp is tighter than the other crimp. [133] You have to get tightness in them and I couldn't measure with a screen like this the difference between that crimp here just by some method out here, but the manufacturer knows what he put into that difference. Otherwise, that screen wouldn't hold together, this screen or any other. That is general practice, has been known in the industry for years. How you as a layman are going to predetermine that, I don't know.

With regard to which points on this wire you

(Testimony of Karl H. Kaye.)

measure the plane in order to determine the depth of your crimp, well, if I were going to do it, I would arrive at it close enough, because I would take 90 per cent of my wire diameter and I would create my plane from that point. You asked me what I would do. I happen to know, and I would do that. Without knowing that, it wouldn't be possible to determine the depth of the crimp absolutely until you arrive by mathematically taking them apart and working with them to see how much we would allow.

I don't believe it is so that in these percentages that I have given, I have simply assumed an arbitrary depth that has no relation to any point on the screen. I gave you percentages that are manufacturing practice, that I happen to know. As to what I am calling a crimp, your crimp starts progressing out after it leaves the crimp and it starts progressing out in a flat plane and therefore that becomes the connecting link. As you bring those crimps closer together in a closer screen, why, naturally, you get them closer. There is the curve in your crimp, and when you spread them out like in other exhibits that are on the floor there, you get a longer connecting link that is flat. I believe I can point out on Exhibit 2 where your crimp stops and the interconnecting link begins. I would say that for all practical purposes, I would say that our link stops approximately here (indicating). I am referring to a point about here. [134] I don't know whether it is $\frac{2}{3}$ of the way from the

(Testimony of Karl H. Kaye.)

bottom of the crimp to the highest point of the interconnecting link or not. I would say it would be 80 per cent, 80 or 90 per cent from the bottom of the crimp. It would be from that point that I would make a plane to determine the depth of my crimp. It would be about 90 per cent of the diameter of that wire will bring you down here and then you make a plane and that is the depth of your crimp.

In answer to questions by the Court, the witness stated:

In our manufacturing process as there may be a tendency to cause an arch in the shape of the connecting link while forming the crimp, the arch does not take a position on the same side of the wire as does the crimp, but would be on the other side. That other side would be the same sort of other side as plaintiff claims his arch is from the crimp. Whatever arch or tendency to arch our manufacturing process produced in the connecting link would be on the same side as the arch in the plaintiff's manufacturing process. If there is one, it naturally forms that way when you punch it. Assuming that plaintiff testified that his arch and his crimp are on opposite sides of the wire, our arch and crimp are similarly on opposite sides of the wire insofar as our manufacturing process produces an arch formation or shape in the connecting link. Of course, we take it out again if it is produced but it would be on the opposite side, the

(Testimony of Karl H. Kaye.)

arch would be formed on the opposite side. We don't have an arch, a curved arch in our finished screen, in the process of our die coming down before we take it out the arch is formed in the same plane opposite, the same plane as he does. With regard to whether in the manufacturing process respecting a small mesh screen I would say that our manufacturing process changed the natural shape of the wire from being straight or elongated so far as the connecting [135] link in the wire was concerned, to an arch shape, I said that when you put it in a loom and you warp it up and drove up your cross wires that in a double crimp screen you will change the curvature of this crimp in the warp wires slightly to a little deeper crimp because of the pressure on it. The process of putting the crimp in the wire alone before you become to the process of looming it into a screen produces or tends to produce for the moment an arch on an opposite side of the wire from that side on which the crimp is placed until you take it back out again. Yes, sir. When the press is in the motion of coming down. With regard to the difference between our manufacturing process and the plaintiffs' so far as the two sides taken by the crimp in the arch, the arch is different, but there is no difference in the plane that it is on.

(The witness, Karl H. Kaye, was withdrawn temporarily for the purpose of putting on other witnesses.)

ROGER DUDLEY

called as a witness by and on behalf of defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

In answer to questions by Mr. Catlett, the witness stated:

My name is Roger Dudley. I reside in Seattle. Defendants' Exhibit A-29 is a picture that I took yesterday down at the Pacific Wire Works to demonstrate the way the press worked. I call it a press, maybe that is not the proper name for it. That is an accurate picture of the press at the Pacific Wire Works. Defendants' Exhibit A-30 is a picture that was taken after the—wire has been punched with that center press. It [136] is the same as in A-29. Both pictures were made at the same time.

The next Exhibit was made yesterday morning also at the plant of the Pacific Wire Works. It is a picture of a different one of the punches. Both pictures are accurate representations of the punches as they appeared at that time.

FRANK J. SEIDELHUBER

called as a witness by and on behalf of defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

In answer to questions by Mr. Catlett, the witness stated:

My name is Frank J. Seidelhuber. My business is iron works, iron and wire works. I have been in that business since 1906 and make anything in iron, brass, bronze and wire. I have made screens of all kinds, whatever you see there, all kinds of screens. In answer to the question "Are you familiar with the art of screen making as it existed prior to 1932?" I say, I think you can arch any wire. In answer to the question "I asked you if you were familiar with the art of screen making prior to 1932?" my answer is, if you called an arch as the grill at the Olympic Hotel—I am familiar with the art of screen making as it was before 1932. I have seen the grill at the Olympic Hotel, the lower floor. I think it is about 20 or 25 years, something like that when I was here. The Olympic Hotel was built in 1924 or 1925. We bid on that grill ourselves. The grill was put in at that time. When they opened it they had the grill in. I have seen the grill lately. There is an arch in the grill. An arch of that character was known to the art. Defendants' Exhibit A-7 is what I meant. We made them 30 or 40 years ago. [137] That is all

(Testimony of Frank J. Seidelhuber.)

right, I can see. Either one is the same thing as this.

Q. We have to designate it by number. Referring to Plaintiffs' Exhibit 3, I will ask you if the character of the arch—— A. The same thing.

Q. Wait until I finish. The character of the arch in Defendants' Exhibit A-7 is similar to the arch in Plaintiffs' Exhibit 3?

A. It is exactly the same thing. That is again the same thing, just a little more crimp. You just set the wheel a little deeper and you get this effect. I am referring now to A-5. In my manufacturing experience we have made cold screens, screens for any purpose, including gravel screens, but in my time when I worked on wire, we did not have the tempered steel. We just used common steel. That is the only difference I see now. The Exhibit A-7 fairly represents the screen in the Olympic Hotel

Cross-Examination

In answer to questions by Mr. LeSourd, the witness stated:

I made screens like this 30 or 40 years ago. For gravel screens, for elevator doors, elevator enclosures, bank grills. At that time the wire was very modern. With the last 20 years they don't use it any more for ornamental iron work, looks too plain, too cheap. People want something like this aluminum, brass, bronze. As to whether Plaintiffs' Exhibit 8 is the type of screen that I made to which I referred, we make all kinds of screens. We set

(Testimony of Frank J. Seidelhuber.)

the wheel and we punch to dress it up. We **make** even the different eyes, different openings, this one big, this one small. You can do anything with wire. I made lots of this, yes, sir.

Q. This was the type you were making for gravel screens?

A. No, a little finer, too. This was gravel screen, perhaps, cold screen. Then we made some finer ones, a little nicer. [138]

Q. You mean smaller openings?

A. No, flatter too, not so sharp, you see, but with wire you can make anything. You can dress it up. What you got here, we made. We made all kinds.

The photograph of the Olympic Hotel screen, Defendants' Exhibit A-7, is not quite similar to this. This is flatter, got a longer arch. This is sharp, but you can do that with your crimping wheel. Defendants' Exhibit A-7, the photograph, has an arch over the top and an arch underneath. They are both the same. I think so.

DAVID J. EVANS, JR.

called as a witness by and on behalf of defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

In answer to questions by Mr. Catlett, the witness stated:

My name is David J. Evans, Jr. I live in Seattle. I am employed by the Pacific Wire Company as

(Testimony of David J. Evans, Jr.)

head of the heavy gravel screen department. Defendants' Exhibit A-14 and the other wires that I see there upon the floor, are from our cross wire rack in our plant, the ends of wires that were used on screens. In other words, we would loom and form our screens and this is one of them. The other ends of these wires were screens. None of these were made up for the particular purpose of this trial. Those have been in stock. Defendants' Exhibit A-29 is a picture of our punch that we use for punching the flat top type screens. A-30 is the same. A-31 is likewise.

In setting up the punch and fabricating our screens, we have the size wire and opening that we know and we set our center punch to a given point whether it is 4 inches or whatever it [139] happens to be for the mesh, and then we make our sample for tightness and looseness of our screen, and if the sample is what we want we progress with the screen. If the sample is not what we want, then we set our punch either lower or raise the top part of our die and make another sample. With regard to whether we measure for the depth of the crimp, that is why we make our samples. We know that if it is too tight or too loose when we make our samples that we have not reached our measurement of $1/32$ or $1/16$. We could measure, but it isn't necessary in making samples.

(Testimony of David J. Evans, Jr.)

Cross-Examination

In answer to questions by Mr. LeSourd, the witness stated:

I have been head of the heavy gravel screen department for Pacific Wire Works for the past three years. When I say that I make samples, I mean that I put a wire in this press and press it into crimps and then make several of those and work them together to see how they fit. If they don't fit properly, what we do all depends if they are too tight or too loose. If they are too tight, we know immediately we haven't gone far enough on our punch. The wires that we reject are thrown in the scrap. None of the wires that were rejected are here. These wires we have here are from screens we have sent out. They are loom ends. I made most of them myself. When I stated that I adjust my dies, I mean that on our particular punches that we have down there, we have pads on either side and we can govern our depth by those. The pads are adjustable. By moving those up and down that will give you somewhat a shallower or deeper crimp. If you are punching a screen and you get a deeper, shallower crimp, that has a tendency to bear on your arch, if you have an arch. We don't have. It is not necessarily true that if your crimp is shallower, the arch and the link [140] between the two crimps must be higher. The shallowness or deepness of your crimp affects the arch in the wire between the two crimps. If you punch your crimp mark deep, exceedingly deep, naturally

(Testimony of David J. Evans, Jr.)

it would have a tendency, but those pads we have on our machine are set to do away with any arch we may have or thought we had for a connecting link. They touch our connecting link and hold it down flat. That is adjustable. You can adjust that in any way you want to. With regard to whether if you made your crimp deep enough and sharp enough you could have an absolutely flat straight wire across between the two crimps, a lot of that has to do with the temper of your wire, hard or soft. As to whether you could do it with hard wire, you are following the way that we punch ours with our pads. If you make your crimp deep enough and sharp enough then you can make the wire between the crimps perfectly flat. We have to set the depth of our crimp according to the hardness and softness of our wire. If you have a hard wire you are not going—you have to go deeper in your punch in adjusting the depth of your crimp. If you have it too shallow, you probably wouldn't make any dent. You have to go deeper on your punch for the hard wire. You can with hard wire go deep enough so as to make your crimp sharp enough to give you a completely flat surface in between the crimps. It has no effect on the wire. Looking at Plaintiffs' Exhibit 10, the Potter patent, and at Figure 1 of that Exhibit, I state that I can make a screen with a perfectly flat link between the two crimps as I see there. I can make that out of our spring steel wire. I can do that by adjusting the pads on our machine.

KARL H. KAYE

Cross-Examination

(Continued)

With regard to whether in Figure 1 of Plaintiffs' Exhibit 10, the Potter patent, the crimp is brought up around the [141] intersecting wire immediately to a plane equal to the top of the intersecting wire, not having any ruler with me or anything to determine that, I would say from the drawing that it wasn't quite to the top of the intersecting wire. According to my eyesight, I would say that it wasn't quite up to the wire. It is possible to weave a screen with the interconnecting links substantially straight in manufacturing practice with a crimp that is very similar to this. I won't say that it would be absolutely exactly like this drawing but very similar to it. I said I couldn't say it could be made exactly like it because a drawing is a drawing and practical manufacturing purposes when you are dealing with rods $3/8$ inch, $7/16$ inch and the vicissitudes of a spring steel wire, if that is what you are using, or any wire, you can't always do it just like a drawing. It can be done like this drawing as far as manufacturing practical purpose will permit. I said it was substantially like the drawing. Defendants' Exhibit A-32 is a crimp quite substantially like the Potter patent. It is a little wider, but it is quite substantially like it with a straight interlocking wire between the crimps. As to what offers resistance to the slippage of the transverse wire on Figure 1 of the Potter patent, marked A

(Testimony of Karl H. Kaye.)

in the center bottom of the figure—what if anything prevents that wire from slipping across the wire above it—the amount of pressure that is brought to bear, plus the indentation that that wire has that is similar to your warp wire when it hits that point, when it hits where those two wires come. Speaking of Figure 1 of the Potter patent and the intersection in the middle of that figure between the A at the bottom and the A above it, the A above, of course, does not have—that follows right through without any indentation. There is an A in the bottom and that has an indentation in it that is similar to the one that is [142] marked B, but that is the transverse wire at that point. The lower A has a cup in it similar to B. It is prevented from shifting to the left and right as you look at that diagram along the wire above it by the amount of pressure that is on it, prevents it from shifting and it depends upon the distance those points are. This drawing would show to me—I don't know the scale of it, if it is a scale—it would show to me it was a relatively close mesh, small opening, and therefore you have the indentations on both sides as well as the one where it crosses that helps to prevent that from shifting. The pressure will keep it from shifting in practical use. As to whether some of the leading manufacturers have found it necessary to put a notch in the upper wire at that point in order to prevent it from shifting, that is what they term as an improvement over it, only when they get any

(Testimony of Karl H. Kaye.)

certain size opening. We are speaking of A-32. There is is no necessity of putting a notch in this, if you elongate that out to a large opening. There is no necessity of putting a notch in an opening like A-32 to keep it from shifting. They can, but it isn't necessary. I would say that as far as I can determine there is not a notch in Exhibit A-32.

(The wires of Exhibit A-32 are separated.)

In examining the wire of A-32 I would say I see an indentation of where the crimp ends and the other one begins. I see the burl of the point here, yes, and I see this point here. I see no indentation along the bottom edge of the straight wire.

In Plaintiffs' Exhibit 2 the link between the two crimps is not as flat as that shown in Figure 1 of the Potter patent, Plaintiffs' Exhibit 10. Plaintiffs' Exhibit 2 does not have a slight arch. It has crimps and then it comes into a flat point and the crimps are getting pretty close to each other but there [143] is a little flat point there. The crimps slope upwards to that flat point. The crimps have an upward curvature and then it comes into the plane of the connecting link and that is flat, essentially flat. They are getting very close together in a small mesh. I don't know whether this upward curvature is convex and concave. I know the crimp has been indented in the wire on the down side and that crimp has put an indentation in it when the press comes down into the die. I know that this is concave and I know this is convex. As to whether it

(Testimony of Karl H. Kaye.)

is convex upward it depends upon what point you are talking about. It has been put there by a punch going down. That puts it in concave position. If you are looking at the bottom side then I suppose it becomes convex. I would say it is convex upwards toward the flat side of the screen.

As to whether that formation tends to prevent the intersecting wire that crosses under it from shifting from side to side that wire from shifting from side to side is in the flat part. That is in the intersection of the flat part, what is left of the flat part. I would say, roughly speaking, about an inch right up there at that point is left of the flat part. It is essentially flat. That is where those two crimps come up to that point. Nothing is absolutely flat in a wire. I would say that the curve in that wire does not offer lateral resistance to the shift of the wire that crosses underneath it. Looking at the same screen at one of the links or arches between the two crimps, if you have it flat on the top side, it is substantially the same on the underside. There is a little difference because of the thickness of the wire, of course. There is a slight difference. I would say at least one half an inch or better is flat on the underside.

With regard to whether on direct examination I stated [144] that the link between the two crimps is of the same length in a given screen, but that it would not be uniform in curvature or height in the same screen, I don't believe I used the term uni-

(Testimony of Karl H. Kaye.)

form in curvature. I said that we would not have identically the same flatness in every one of our connecting links between the crimps. It will not be absolutely uniform in the same screen. By that I mean there is a little variation in the wire. That depends on how it comes off the coil of wire. There is a variation in the wire. It isn't all the same. I don't know the maximum and minimum limits of that variation because one coil might be one thing and one might be another. Wire is not uniform. I couldn't divide it in that term. If one of these connecting links is higher than another in the same screen, there might be a slightly higher point in it and that point will wear itself off a little bit. I would say that is undesirable in our manufacture. It would be better if it didn't have it in, if we had it absolutely flat, if manufacturing process could make it without that variation, but our wire we get isn't that kind of wire. We haven't been able to get it. We don't ordinarily use two kinds of wire in the same screen. There can be a difference in the same coil of wire from the beginning of the coil to the end of the coil. I wish that wasn't true but that is the way it comes to us. We endeavor to make the length of the wire between the two crimps the same, that is the crimps are the same distance apart. As to whether there may be a longer wire between the two crimps than two others, not necessarily. The crimp, the bottom part of the crimp that goes into the die, we try to make it naturally the same

(Testimony of Karl H. Kaye.)

distance apart. There can be a slight variation in that, even, because of general manufacturing practices, slippage and so forth, and take up in the wire itself in the flow of that material when you press it down in this form, so if you [145] put a calipers on it, and you were getting down to a very fine point of calipering, I would say there would be some slight variation because it just isn't possible, because of that flow of material. There is a point by which it becomes practical and a point by which I can answer your question.

It isn't certain tolerances to which we must make a screen. There are certain tolerances that the gravel user has to come within a curve, if that is what you have. There is nothing that specifies that we have to have a certain tolerance in our screens. That is our own specification, there is no outside specification. We endeavor to build our screen in order to give a certain tolerance of material passing through. We endeavor to make the crimps the same length and the depth the same depth but there is a slight variation because of the wire. We endeavor to come as close as we possibly can with our type of manufacture and our type of die.

In order to determine whether Plaintiffs' Exhibit 2 has a slight variation, I will have to measure every hole very accurately to give you that answer and there are quite a few holes in it, but I will be glad to do it. In looking at it with the naked eye that still doesn't mean that there isn't any varia-

(Testimony of Karl H. Kaye.)

tion. I would say that there is variation visible to the naked eye. To me there is a variation right here (indicating). This hole here is a little different than this hole. There is a little variation here and here and over here. Other than these outside set of holes I believe there is variation. It looks to me like this hole, it might be what is under it that throws me off, but it looks to me like this hole is at variance between this one. It isn't quite the same. I think there is a little variation between some of these openings. I would say there was to my eyes without measuring them. I could give you a more [146] accurate statement if I was allowed to measure them.

In our process of manufacture we cold press the wires. Our screens of the flat top type are made of high carbon commonly known as spring steel wire. Examining Exhibit 10, the Potter patent, and Figure 1 at the underside of that wire that goes across the page from left to right and in particular to the crimp or cup and the underside of the crimp or cup and to the point where that underside straightens out into the straight part of the link between the two cups, I would say there was a fairly sharp corner at that underside point. In Plaintiffs' Exhibit 2 there isn't the like sharp corner because the crimp is a little wider than the crimp in here. It isn't the same, the crimp I am speaking of.

Some of the leading manufacturers have placed a nick in the underside of the intersecting link in

(Testimony of Karl H. Kaye.)

making the Potter screen in order to prevent shifting in some openings; some manufacturers have in some openings.

Referring to the Galloway patent, Plaintiff's Exhibit 11, and Figure 2 on that patent, with regard to the depressions on the top of the wire which are marked with the Figure 6, those depressions are made by the teeth which come down in order to form the arch No. 7.

Prior to 1944 we made in our factory screens with openings larger than 1½ inch. I do not believe we made the flat top type of construction prior to that time. I would have to look at our records. We might have made a certain opening on those but I would have to look at the records. I would say we were not making the same type of screen that we are making today that we call the flat top construction, 1½ inch or over between 1940 and 1944, unless it was on one or two openings and I would have to look at the record. During that period we bought some of Mr. [147] Palmer's screens and sold them. We invoiced them as Pacific Wire screens. I would have to see when we started to use the 4-S which is our trade name for it. I don't know exactly without referring to our records when we started that, but we have never put on our invoices at that time or ever since. We don't invoice a certain particular type of a screen. We call it now Pacific 4-S. Then we would call it a Pacific screen or gravel screen, of certain dimen-

(Testimony of Karl H. Kaye.)

sions. That is all that would go on the invoice. These dimensions and the wire and the full other description of it. We do not make screens of larger than a 1½ inch opening in the double crimp because we find that it isn't as practical to do it when we get into the larger openings. It isn't as practical because you have to insert intermediate crimps. Otherwise your double crimp would be so far apart that you wouldn't be able to hold it together very well, so you would resort to an intermediate or extension crimp. That is, we make them occasionally even in larger openings for a specification, even in a spring wire where a man wants a very light wire that is applicable to a flat top construction. We have made screens of a larger opening than 1½ inch by using extension crimp.

After we commenced making our own screens of the flat top type, if we had used the 4-S trade mark at that time, we would have described them or do describe them as Pacific 4-S screens. There would be no difference in the manner in which we describe these screens on the invoices and the manner in which we describe Mr. Palmer's screens on our invoices. At the time in 1944 that we ceased buying from Mr. Palmer, we had built up a substantial business in those screens, the entire range, it was increasing. It was fair and increasing. After that time we supplied them with other manufacturers' screens as well. We supplied our own manufacture, yes, but like all manufacturers, sometimes they buy out.

(Testimony of Karl H. Kaye.)

When in my direct examination I stated that in our screen we depended upon tightness and the indentation on the interlocking wire, by indentation on the interlocking wire, I meant the same crimp that is on the other wire. That is the crimp. We do not put any notch on the bottom side of the link between the crimps in our screen. We have not arranged with Abbey Scherer as yet for the rights to put in such a notch. It has been under discussion but has not been arranged.

In answer to questions by the Court, the witness stated:

What has been under discussion is not for the meshes that we are already making, the larger meshes, it is for the finer meshes that we are not now making, such as finer than $1\frac{1}{4}$ inch opening. Our conversations with Abbey Scherer has not been on the meshes that we are now manufacturing. It would range from $\frac{5}{8}$ inch opening to $1\frac{1}{4}$ inch opening.

In answer to questions by Mr. LeSourd, the witness stated:

I have been discussing with them the possibility of purchasing some rolled crimpers which they have designed themselves, no reference to the notch at all. There has been no discussion on the notch at all, if there is a notch in there. In the one that I saw, there wasn't a notch, that I discussed last summer. The discussion that I held with Abbey Scherer on the subject a year ago in May and the

(Testimony of Karl H. Kaye.)

early part of June, and that did not contain a notch. I have had no discussions since. I wouldn't contend that a die couldn't be made to make the other connecting link between the two crimps absolutely flat. I am not a die maker but I wouldn't contend that it wasn't possible to make it substantially straight with manufacturing practice, what you have to contend with in the spring. It wouldn't have anything to do with it if the crimp or cup was brought up on [149] each side of the intersecting wire immediately up to the height of the cross wire. In my opinion, the fact that in the Potter patent the crimp or cup is brought up suddenly to the height of the interconnecting wire has nothing to do with the straightness of the link in between the two crimps.

The Palmer type screen might be better for the smaller openings, $1\frac{1}{2}$, $\frac{3}{8}$ has been one that has been very much in prominence that you have brought up. I would say that was classified as a smaller opening of the total range of larger openings running from $1\frac{1}{4}$ inch to 6 inches. In my opinion, the Palmer screen would be better for that opening of his range; not necessarily better for all of the other types of screens made in that opening, but I said in his range that he makes, the smaller the opening comparatively his screen will be, in his range will be a better Flint screen. I do not mean as compared to a Potter screen. I said better as to his own range of screens, his own range of openings.

(Testimony of Karl H. Kaye.)

I am not testifying that in the 11½ the Palmer screen would be better than the Potter screen.

With reference to Exhibit A-1 which is the drawing of Mr. Lippincott's demonstrating the high low crimp, a screen from that crimp is the same on both sides. [150]

I know bulletin No. 230 of the Manganese Steel Forge Company was a bulletin of that company because that is what it said on it. That is their bulletin. It was handed to me by the president of the Manganese Steel Forge Company in Philadelphia, Pennsylvania, and he said, "This is our bulletin" or catalog. He gave me that in—I can't give you the exact date without looking it up, but it would be, I believe, the third week in—1949, September, 1949. The bulletin was copyrighted in 1931. I don't know when it was printed nor when this particular edition was published.

Redirect Examination

In answer to questions by Mr. Catlett, the witness testified:

I am the president and general manager of Pacific Wire Works and owner of the majority of the stock. With regard to the extent of the crimp, on Exhibit A-29 and Exhibit A-30 is the same press, same material, but the head of the press is in a different position. The depth of the crimp has been put in by the male portion of the top die resting into the bridge die. The depth which this punch comes down to that point, of course, is

(Testimony of Karl H. Kaye.)

adjusted at the time the mechanic sets up the punch to make it for a certain given opening. Now, in setting that punch that many times—I won't say every time, but many times they will take an actual ruler and put across the top of where the crimp, the side of the crimp portion and take a straight ruler across there and determine from that whether they are within the percentages that we have set up to the 32nd and 16th of the diameter of the wire. You can do that when you have the one wire, just the wire itself. It is very difficult to do it when it is woven in a screen, obviously. Then they can determine whether or not they are within that percentage, for instance, on a $\frac{3}{8}$ inch wire making an $1\frac{1}{2}$ inch opening, we figure approximately a variation of around 32 or 16 [151] variation in there of the 84 to 92 per cent.

Then the punch, they will set that as accurately as they think they have set it, putting a ruler on it they can measure it from the top side down to that depth. Then they will punch up one rod of a length enough to make a sample screen, which will be the size of about one of these samples here with at least four wires in it running both ways, and can determine quickly whether they have to vary that percentage up or down within that scope, and if the screen is too loose, of course, they are going to loosen up on their top of the die so they don't come down quite so far, so the depth is not quite so deep, so they have more of that percentage

(Testimony of Karl H. Kaye.)

left of the wire to hit that intersection when it crosses the other wire when it is woven in a screen.

If it is too tight, which it could be for practical weaving purposes, they will do just the opposite. They will make it a little deeper and they may make it—unfortunately, sometimes they make two or three samples or more to get that determined, but a mechanic who sets these up all the time, he does set them up very quickly, but I know there are times when we actually put a ruler across it and measure it and do that.

The actual depth of the crimp is, you lay a ruler across the top side of the crimp after that has been set there for that depth and you put your ruler or straight edge across where the indentation has been made, where it first comes up to the flat portion on the top. Then you measure from that to the top side of the crimp in the crimp part, the bottom of the crimp and that will tell you what that depth is. The width of the crimp extends from the point of that plane where your ruler lays straight across, if they have determined that depth to the other side, clear across the crimp to that other side where it meets with that straight line.

(At 5:10 o'clock p.m., Thursday, October 20, 1949, proceedings adjourned until 10:00 o'clock a.m., Friday, October 21, 1949.)

(Testimony of Karl H. Kaye.)

October 21, 1949, 10:30 o'Clock A.M.

Redirect Examination

(Continued)

In answer to questions by Mr. Catlett, the witness stated:

None of our screens have a uniformly formed elongated arch in the flat top type of construction. Our screen is not exactly like the Potter patent. It is similar to it but it isn't exactly like it. Our crimps are wider than the Potter patent. And when our crimp comes up to the connecting link between the crimps, it is similar to the Potter patent in that it is practically flat, that is, the connecting link. The exhibit attached to the Roebling deposition, Defendants' Exhibit A-5, is similar to our screen of the same size of the flat top type. The crimps on that are similar to our crimp, not to the Potter crimp.

In answer to questions by the Court, the witness stated:

With regard to whether there is any set rule by which the nature of these crimps can be made so as to differentiate ours from Roebling's or from Potter's or from the Palmer type of crimp, you can take a wire out of the screen itself and take one out of—for instance you can take a wire out of A-5 and you can take a wire out of an exhibit of ours, I can select on the floor, of the same opening, and you can take a wire out of the same opening of the plaintiffs, and you could measure them very

(Testimony of Karl H. Kaye.)

accurately and could put them alongside of each other if necessary, or you could measure them and draw it out. With regard to the method of forming [153] crimps, Roebling's manufacture and ours is very similar. We have a drawing of one of the Roebling dies here. As to the plaintiff's manufacture, I have to rely on my memory of going back several years. I believe in many of his openings he uses a different die, which is a forming die of the length between the crimps as well as the crimp, also the link. There is that difference. There is no difference in the way that we put the crimp in the wire and the Plaintiff and Roebling. It is done by pressure on male and female dies. The pressure is applied by means of a plunger or punch. As to whether the resulting crimp shall be described as a deep one or shallow one or narrow one or wide one, it depends upon the die itself, the shape of the die, and upon the amount of pressure applied on that punch, and against the wire. With regard to whether there is any difference in the shape of our die, the shape of the Plaintiffs' and the shape of the Roebling die, every die is not the same. The shape—you can make a die that would be closer to make a closer crimp or a wider crimp. You can make that kind of a die.

The distinguishing difference between our screen and the plaintiff's screen is in respect to the connecting link, rather than the crimp. My understanding of the difference as to the connecting link

(Testimony of Karl H. Kaye.)

is that according to the plaintiffs' patent as I have read it, the connecting link is a continuous—if I had the patent I could—a continuous arc, a shallow arc or longitudinal arc, a continuous longitudinal arc. His patent don't say what the curvature is determined by, so I can't take from the patent what he determines it by. The only means of knowledge is just by what the plaintiff stated here in his direct testimony, that the depth of his crimp was approximately $\frac{2}{3}$ of the diameter of his wire. Therefore, I presume that when he projects the depth of that crimp out to the interlocking point that he will have to get that curvature [154] in a plane that would make up that difference, or substantially that difference.

I attended the University of Washington. I didn't graduate. I studied higher mathematics in high school. Well, I did take the theory of—mathematical theory of investment, a course in the University, and I did take trigonometry in high school. With regard to any mathematical formula or rule or principle by which the shape of the curvature in the plaintiffs' patent is fixed or determined, the shape of the curvature that he would fix in that connecting link will be in a relationship to the depth of his crimp, and the size of his wire, and to arrive at a mathematical exhibit to see as an example, yes, we could do that. It can be done. In fact, I have a drawing here that could very well illustrate that point, I believe, of the difference

(Testimony of Karl H. Kaye.)

that we made, that Mr. Thacker made this morning. There is no mathematical formula or principle known to me which you could give to an expert and he could take this formula and produce a curve, or an arch in this connecting link in accordance with the claims of the plaintiffs' patent, because the patent as I recall does not give the information what the depth of the crimp is. It says a shallow crimp, so therefore there is no mathematical way you can extend a shallow crimp into a continuous arc. You first have to know what the depth of that shallow crimp and the wire is. His patent doesn't give that formula. You couldn't make a formula out of the patent papers itself, no, sir. You must have these other factors.

I believe it can be worked out mathematically as to the height or curvature of the arch in the connecting link if you made a screen of an appreciably larger mesh with a given size wire. You start first and determine from your first sample what the depth of your crimp is. You can determine that in relation to [155] the size of that opening and wire. Then your question is if you extend that out with a larger size wire and extend it out into a larger opening, will there be a relation mathematically. Using the same size wire in an opening and increasing the size of the mesh or opening and you utilize the same depth that was put into the smaller opening and you extend it, it will definitely be—you could make your mathematical com-

(Testimony of Karl H. Kaye.)

putation on your small opening and you would extend that out and you could then mathematically determine your arch using that same base formula of the size of your wire and your depth that you had in the small mesh. If you change the size of your wire as you went out and used a small mesh and a smaller wire, then in your calculations you would have to assume that you were using the same ratio of depth of the crimp in the larger wire that you did in the smaller wire, and assuming that, then you would make your computations of the larger wire and extend it out to your opening and you could mathematically determine the curvature that you wanted to place in it, a curve in it using the same formula.

In answer to questions by Mr. Catlett, the witness stated:

The picture of the roeflat screen in the upper left-hand corner of the cover of R-3 of Plaintiffs' Exhibit 17 shows a crimp that is similar to our crimp. It can be similar to the Palmer screen. That is a flat top type screen. When you say similar, it might be a little deeper than the Palmer screen. The connecting link is flat on the surface, the top surface, these connecting links between the crimps. That is similar to the flat surface on the top of our screen.

(Catalog marked Defendants' Exhibit A-36 for identification.)

(Testimony of Karl H. Kaye.)

Defendants' Exhibit A-36 is a catalog of the W. S. Tyler Company, who are manufacturers of all types of woven wire screens and cloth, Cleveland, Ohio. They are probably one of the largest [156] manufacturers in the United States of this type of material. This catalog was sent to the Pacific Wire Works Company and I first saw it when I was there and it was in our possession when I was there in 1931 as part of our file of catalogs. The catalog itself contains a copyright date 1927 by the W. S. Tyler Company, Cleveland, Ohio. It shows types of screens with the elongated arches.

In answer to questions by Mr. LeSourd, the witness testified:

I didn't say I found the catalog in the files of our company in 1931. It was in our files of catalogs when I was in the employ, when I went back in 1931, as part of our files of catalogs. We have a fairly extensive file of catalogs.

(Mr. Catlett moved the admission of Defendants Exhibit A-36.)

Mr. LeSourd: If the Court please, I will object to the admission of this catalog first on the ground that it is not properly authenticated; and secondly, on the ground that counsel is making this offer without any restrictions or limitations as to the purpose of it. He has in his amended answer cited three examples of prior art which he insisted anticipated the invention here, the Potter, the Gallo-

(Testimony of Karl H. Kaye.)

way and certain developments by one Lippincott. There is no reference to anything manufactured by this company, and consequently the document is inadmissible for the purpose of showing any lack of anticipation, if that is the purpose.

(There followed a legal argument.)

Mr. LeSourd: The law is well settled that the defendant to a suit for infringement must give notice in his answer of any defense by way of prior patent, publications or public use, if he desires to prove any of such defenses to show want of novelty or invention in the [157] patent sued on. Otherwise, such defenses are receivable in evidence only to show the state of the art, and to aid in the proper construction of the patent.

The Court: I understood before these things were mentioned that is what he did offer it for.

Mr. Catlett: Exactly, that is what I did offer it for, to show the state of the art.

Mr. LeSourd: With that limitation, we would have no objection except on the ground it has not been properly identified.

In answer to questions by Mr. Catlett, the witness testified:

The illustrations and information contained in the catalog bear upon the shape of the crimp and the shape of the connecting link between the crimps.

The Court: What is the purpose of your offer of this?

(Testimony of Karl H. Kaye.)

Mr. Catlett: The purpose is to show, if Your Honor please, the prior state of the art.

Mr. LeSourd: For the purpose of construction of the claims of this patent?

Mr. Catlett: It can be for that purpose, yes.

Mr. LeSourd: And that is the only purpose?

Mr. Catlett: The purpose is to show the prior state of the art generally. [158]

Mr. LeSourd: Then I will renew my objection, because as these cases stated, it can be shown only for the purpose of construing the claims in issue and not for any other purpose, and when he says generally, that might include——

Mr. Catlett: That is just bandying words, if Your Honor please, it seems to me. Of course, it is for the purpose of construing the plaintiff's patent we are talking about.

The Court: For that limited purpose and for no other the Court permits this inquiry. For that limited purpose, Defendants' Exhibit A-36 is now admitted.

(Defendants' Exhibit A-36 received in evidence.)

Mr. LeSourd: If the court please, could we have for the record a statement of the limited purpose so that it would be clear in the record?

Mr. Catlett: I am offering it, if Your Honor please, for the purpose of showing the prior art and its bearing upon the interpretation of the plaintiff's patent.

(Testimony of Karl H. Kaye.)

The Court: For that limited purpose, and for no other, Defendants' A-36 is now admitted.

In answer to questions by Mr. Catlett, the witness stated:

On page 80 of this catalog in the lower left-hand corner is an illustration, and under that illustration is this caption: "No. 23 Ton-Cap." In that illustration, it shows a long mesh type of screen with the warp wires showing a short crimp or shallow crimp, I should say, and an elongated arch or crimp passing over [159] the intersecting wires, and then another shallow crimp, and if the illustration continued onward, would have another full arch, which it doesn't. There are a series of those wires showing that shallow crimp and an elongated arch. That is similar to the Palmer patent. There are no other illustrations on that page.

Mr. LeSourd: If the Court please, I move to strike that answer on the ground it violates the very limitations which counsel put on his offer of this document. He asked, "Is that similar to the Palmer patent?" That question doesn't go to the construction of the claims in the Palmer patent, it goes to the very thing the Court just ruled was not permissible with this document.

Mr. Catlett: I think it bears on the construction of the claims. He claims he has an elongated arch, and here is a similar elongated arch.

The Court: The objection is overruled and the motion is denied. Be very careful, Mr. Catlett,

(Testimony of Karl H. Kaye.)

to have in mind in framing each question the exact nature of the limitation of the offer and the Court's ruling admitting it.

In answer to questions by Mr. Catlett, the witness stated:

I find another illustration in there of similar character on Page 82 on the lefthand side of the page, upper corner, is an illustration and the caption underneath it is, "No. 1322 Ton-Cap Screen," and that illustration shows a long mesh or a rectangular mesh where the warp wire has a shallow crimp, a long crimp or arch going over the intersecting wire, a shallow crimp again and then a long crimp if it extended out. There are four of those wires in this illustration. On Page 85 we find several such illustrations. There are four—there are two on the right [160] hand upper part of the page, there are two on the right hand lower part of the page, and the caption underneath the illustrations on the upper right hand page, the one to the left, there being two side by side, is, "No. 392 Ton-Cap," and on the right hand side of that same clipping, under the illustration, "No. 390 Ton-Cap." Above the two illustrations is the notation, "All wire cloth illustrations are actual size."

In answer to questions by the Court the witness stated:

The drawings I was referring to are on the lower right of the page. I don't intend to mention the middle right. The lower right would be the next

(Testimony of Karl H. Kaye.)

two under the left one on the lower right, "No. 514 Ton-Cap." It is a trade name of Tylers that they use in this type of screen. On the right side of the illustration I just referred to in the lower right hand corner is, "No. 38 Ton-Cap." These illustrations on this page show rectangular screens with the warp wires having a shallow crimp and the long crimp and then a shallow crimp or a long arch, if you want to call it arch, or crimp, and that crosses the shot wire at the intersection of the middle of that crimp. That is also true of the two illustrations on the lower page, No. 514 and No. 38. There are differences of the openings, of the rectangular mesh, but the construction is similar in that the warp wires again have shallow crimps and a long crimp or arch, a curvature of the wire. In the center of that, the shot wire is under that long crimp.

On Page 86, on the left hand side, is a group of two illustrations. Underneath the left one, is the caption, "No. 390 Ton-Cap Screen." There again we find that the warp wire—this is a long mesh, rectangular screen—that the warp wire has a shallow crimp, a long crimp and then again a shallow crimp with the shot wire or transverse wire going under the long crimp at its center between the two other shallow crimps. [161]

On page 89, we find three groups of two illustrations each. We find there that the upper group on the right hand side, we find an illustration, "No. 903

(Testimony of Karl H. Kaye.)

Ton-Cap," and there we find a rectangular mesh with the warp wire being again a short or shallow crimp and a long elongated crimp and the cross wire or shot wire being in the center of that elongated crimp.

Then on Page 90, we find a grouping of four screens that are not marked by numbers. They are photographs of screens. One has been sort of laid on part of the other two, forming a grouping, and on the one that is in the upper left hand corner we find there a screen that is a rectangular screen, the opening very close together with the shot wires again having a shallow crimp, and then an elongated crimp or arch and a series of those and several wires shown distinctly in the screen, and the cross wire or shot wire transposing that at the center of those long arches or crimps.

On top of the next one closest to the left, we also have an illustration showing the warp wires closer together with a very long shallow crimp and then a long crimp and then your cross wire meeting it at that point, the difference between the two of them being that the warp wires are closer together, thereby making a narrower opening.

The nicking referred to in the testimony yesterday was known in the art prior to 1932. Nicking anything was common prior to that time. You will make a wire when you make a double crimp which has been used ever since screens have been made. Some of that tooth comes down and forms it. Many

(Testimony of Karl H. Kaye.)

teeth make a nick. The Figure 1 and the Figure 4 of the Galloway drawing in Plaintiffs' Exhibit 11, what appears to be a nick is the indentation on those wires where the die has formed the crimp. That could possibly be construed that the die did make a nick in that wire, or an [162] indentation. With regard to how the nick or condition described by me shows in that drawing, well, as shown in the drawing there is some series of oblong circles, egg shaped circles. However, that is a nick in the wire, it is made by the die. As to whether it is the plunger in the die that makes it, it is the opposite side, the female side. The plunger comes down on the other side of the die. It is the impression made on the wire by the plunger pushing against the wire for the purpose of forming the crimp. I believe that Plaintiff's Exhibit 9, a duplicate of the Ludlow-Saylor screen, made prior to 1932, would disclose a nick. Having pushed aside one of the wires of Plaintiffs' Exhibit 9, there is a nick shown on the wire at where it would normally cross on this Exhibit A-9 on the right hand upper corner.

In answer to questions by the Court, the witness stated:

That nick was apparently put in there to help seat this cross wire. If we had that apart, which we haven't got it fully apart, we would find a quite similar indentation right on the bottom, I believe, of this crimp, and that seats it a little better right in there because of this nick in the

(Testimony of Karl H. Kaye.)

other. If we had the wire completely out it would show. The one I am now speaking of is in about the middle of the connecting link between the crimps. It is on the same side of the wire as the crimp, as the downward extending crimp. It is supposed to be in the center of the connecting link. In this sample, because it is a square mesh. It could be different if it was a different mesh, of course, but in a square mesh of course it would be. That is a different crimp so far as its location and purpose is concerned from the so-called crimps that were previously referred to in the Figures 1 and 4 on the illustrative sheet attached to the Galloway patent.

In answer to questions by Mr. Catlett, the witness stated:

We make the flat top type screen at the present time [163] without nicking. I believe also John A. Roebling's. If we could take that sample apart that we have here in evidence, that Exhibit A-5, I do not believe that if you take that sample apart you would find any nick in that at these cross parts. I cannot see them with my eye on any of the ends. However, in this case, we could pull apart part of that that has been cut that was part of that sample that we have. We could tell definitely without distorting the exhibit.

In answer to questions by the Court, the witness stated:

I would say that the screens made by plaintiff

(Testimony of Karl H. Kaye.)

do not show any analogous or corresponding nick. I don't believe that it is plaintiff's claim that a nick is not needed or might not be good. I believe he states that it isn't a claim under the patent. As to whether if the plaintiffs' patented process forms a lock at that place between the wires without the nick, that feature distinguishes the plaintiffs' patent from the Potter patent and from other screen manufacturing processes which do use the nick, I can't answer that question "yes" or "no" because there are two parts of it, I believe. It isn't true that the plaintiff makes a lock there in all openings, and that is the part of the question that is hard for me to construe in relation to this, because as that opening—there is nothing said in the patent as I recall the claims that as you extend the opening out to a large opening and a given size wire you have a locking effect on that curvature, of that slight curvature of that interlocking link, so your locking effect can vary from a good locking effect, probably, in one opening, and no locking effect at all as that arch gradually gets out. However, with a nick, that nick is in relation to the size of the wire, and it don't make any difference what size opening you have. That nick is placed at that point. The plaintiff has claimed in direct evidence here that nicking is not needed in the plaintiff's process. I don't know whether he claims he has an advantage over the nicking arrangement or not. I believe he has claimed he has a supposed advantage

(Testimony of Karl H. Kaye.)

over the Potter patent with a straight wire, but I don't believe he has made the claim that it is better than the nicking, or it has an advantage over one that has a nick in it. I do not recall that claim has been made. I do recall it on the flat one.

In answer to questions by Mr. Catlett, the witness stated:

The nicking was known in the art prior to Mr. Palmer's patent. It is in this sample we have here and it also applies to the other. We have sold screens to users who require what they call close tolerances, quite a few. We have found our screens acceptable. We have generally not had difficulty with our screens because the intersecting wires slipped. It will be the odd screen. Names of our purchasers where close tolerances is required are a contractor by the name of J. G. Shotwell. He has the contract to produce the sand and gravel aggregate in the first portion of the McNary Dam, and that is at McNary, Washington, and Umatilla, Oregon. It is going across that river. We are supplying this contractor with Pacific 4-S screens for his aggregate segregation, and some of the sand segregation also in his main plant or plants. He has a direct contract with the United States Engineers. The specification that job with the Engineers in relation to his sizing, is one of the most rigid in the country. We supply him from small openings on through to the larger openings, his $3\frac{1}{4}$ inch opening $\frac{1}{2}$ inch wire. It has a range of sizes that are of

(Testimony of Karl H. Kaye.)

the flat top type only as we manufacture them, not the finer ones that are double crimped, but the flat top only. We are supplying them in sizes running from $1\frac{5}{8}$ inch opening $\frac{3}{8}$ wire to $3\frac{1}{4}$ inch opening $\frac{1}{2}$ inch wire.

At the early part of his operations, naturally an operation as big as the McNary Dam is quite a feather in the cap of a manufacturer to have his screens used. The contractor, on the other hand, because of the size of the job, he tried out different screens and different manufacturers' screens in the early part of it. I visited the plant in the latter part of—a few days before the 4th of July, 1949, this summer, went over the plant with him. I had an opportunity to see our screens, other screens in evidence at the plant that had been bought from other manufacturers, including the plaintiff's screens, and at that time he had purchased a substantial number of our screens up to that time, and at that time the contractor, Mr. Shotwell, in the presence of his own superintendent and myself, made the statement that from here on out he was using Pacific 4-S screens exclusively on that job. We have since, of course, sold him his requirements for the main gravel plant.

In answer to questions by the Court, the witness stated:

The difference between Pacific 4-S flat top screens now being used at the McNary Dam and the plaintiff's patented screens is ours has a straight connecting link between our crimps, and also I want

(Testimony of Karl H. Kaye.)

to point out that we do not have a nick where the cross wire goes. With regard to whether in that respect it is just like the plaintiff's, the absence of the nick is just like the plaintiff's. That is what I wanted to bring out, that you could make a flat top type of screen using a substantially straight connecting link between the crimps and also produce a screen that will give satisfaction to customers and also keep to exact sizes. Our crimp may be a little deeper than the plaintiff's. I wouldn't know without being able to examine all of his openings, the plaintiff's openings. I haven't those at hand to examine them, but our crimp is probably—I can arrive at it from a formula that the plaintiff gives in Court. Our crimp is a little deeper [166] because we go up to approximately within a 32nd to a 16th of the diameter of our wire, while the plaintiff stated that his depth was guided by about $\frac{2}{3}$ of the wire size, being the depth of his crimp, so that is the only basis that I could form. I have no other samples here that I can compare it with in all of the range of openings that I am speaking of. In answer to questions by Mr. Catlett, the witness stated:

You cannot accurately measure the depth of a crimp on the screen itself. It is very difficult. You can very easily measure it on a single wire. In fact, the practice to measure in double crimp, any kind of wire cloth or screens, is to remove a wire or wires and measure the crimp from there.

(Testimony of Karl H. Kaye.)

Recross-Examination

In answer to questions by Mr. LeSourd, the witness stated:

With regard to whether we form the wire in plaintiff's exhibit 2 so that it proceeds from the bottom of the crimp to the top of the link without a sharp bend, I don't know your definition of a sharp bend. A sharp bend can vary, of course. If you will first give me the definition of what a sharp bend may or may not consist of, then maybe I can more intelligently answer your question. I think you first have to determine that, because it might be quite relevant. We do not make as sharp a bend as in the drawing of the Potter patent. With regard to whether in forming the wire that subject to the limitations imposed by the shape of the wire as it comes from the bottom of the crimp up to the top of the link, we make the top of that link as flat as possible. No, I don't know how flat as possible it can be made. That is an engineering principle. We are making it as flat as our present dies make it. There can be improvements on it. The fact of the matter is, I would like to submit the same size opening and another exhibit here. No we do not make it as flat as possible. [167] We can and are making it in another die flatter, a little flatter. The flatness is extended a little bit, I should say. We do not make these links as flat as possible. You asked me if this link in Exhibit 2 was as flat as we could possibly make it, and I said

(Testimony of Karl H. Kaye.)

that it is the flatness with one of our other dies in the same opening, does prolong that flatness more pronounced and longer in flatness. With regard to the screens made for the McNary Dam, we make them as flat as our present dies will make them. With our present dies as they are designed, we are making it as flat as our present dies will make it.

(At 12:05 o'clock p.m., Friday, October 21, 1949, proceedings recessed until 1:45 o'clock p.m., Friday, October 21, 1949.)

October 21, 1949, 2:15 o'Clock, P.M.

Recross-Examination

(Continued)

In answer to questions by Mr. LeSourd, the witness stated:

With regard to the question "Is it your testimony that in your flat top screen you are making your link as flat as possible in view of the shape of the wire as it comes up from the bottom of the crimp," there are factors in there that I can't answer "yes" or "no." The factors of the wire itself, the hardness or softness of the wire. We are attempting to make it with our present dies as flat as we possibly can with the type of wire that we are now purchasing. We are making it as flat as we possibly can and still bring the wire down under the next intersecting wire without a sharp bend such as is shown in the Potter patent. That is true with all of

(Testimony of Karl H. Kaye.)

our flat top screens, if you have reference [168] to the Potter patent as the figure is shown in the drawings.

Not all of the screens we have sold to the McNary Dam are a flat top type. We have been selling a more complete range. Not all of them are flat top type. These screens sold to McNary start at $1\frac{5}{8}$ inch opening $\frac{3}{8}$ wire, and runs not every opening, but the largest is $\frac{3}{4}$ inch opening $\frac{1}{2}$ inch wire. The screens sold to McNary project within those ranges are flat top type construction.

With regard to whether the screens I pointed out in Exhibit A-36, the Tyler catalog, are the same on one side as the other, the screen itself—well, I would say they were not, because of certain conditions that exist on them. They have on the top side which they normally use as a top side, they have put it through a roll and flattened some of the sharp part of the transverse crimp and it does get a little of the longer crimp. That would not hold true, probably, on the bottom side. I can't see it but I don't think it would hold true on the bottom side. The screen is exactly the same on both sides unless one side has been later rolled.

Lippincott's deposition and drawings do not show that they are putting a nick in all of their screens. It shows that they have designed a die to put a nick in them. It don't mean for every opening. I wouldn't say it said that. By opening I mean mesh. Mesh or opening.

(Testimony of Karl H. Kaye.)

Redirect Examination

In answer to questions by Mr. Catlett, the witness stated:

The flat top screens which we furnish McNary Dam do not contain any nicks where the interlocking wire is. I am thinking of the screen that has the flatter top, so far as the connecting link is concerned, and am referring to the contact underneath that straight connecting link. There are samples in an exhibit that [169] are the exact openings. Referring to some of those wires that are the same size as the McNary screens, here is one here, A-22, 3 inch opening $\frac{1}{2}$ inch wire which we furnished them. There is no nick in the underside of this wire where this meets in the screen or in any screen that we make or ship to McNary Dam or anybody else, and that surface, these points here in that opening from the crimps to the opening are substantially flat. I don't think there is a larger one but there might be an intermediate one. I was trying to get the exact opening. I have the same opening in a slightly lighter wire. That isn't exactly the same wire size. A-12 is a wire that is crimped for a $1\frac{3}{4}$ inch opening, $\frac{3}{8}$ wire. We have supplied $1\frac{3}{4}$ inch, $\frac{3}{8}$ and also $1\frac{3}{4}$ inch, $\frac{7}{16}$ to this contractor. There is no nick on this wire in the point which would be the center of this connecting link, which would be here, to impede that wire that is in the center of the connecting link, the crimps and ordinary link begins, which is substantially flat.

(Testimony of Karl H. Kaye.)

There is a nick in the bottom or trough of the crimp formed by the plunger.

If Mr. Palmer were making a screen with as wide a mesh as Exhibit A-17, $2\frac{3}{4}$ inch, $7/16$, his arches naturally have to become more flattened, and the wider apart your crimp, the connecting link which is after has to be flatter. The flattening out of his arch lessens very materially any possible locking of the transverse wire. If he got out to a longer link like his 6 inch, he would have none left there, practically get to a straight portion where the transverse wire meets.

We have furnished screens that some have gone to the Hungry Horse Dam in Montana this year. We also have furnished to operators who have been getting out sand and gravel for the Reclamation Department in the Coulee Dam for the canals. They all are under rigid specifications. We also have furnished, contractors [170] who are getting out ballast for railroads. They all have flat top type screens, the big part of the screens that they purchase.

(Defendant's Exhibits A-7, A-8, A-29, A-30, A-31, A-32, A-33, A-34 and A-35 were received in evidence.)

In answer to questions by Mr. Catlett, the witness stated:

Defendants' Exhibit A-28 is the mill copy of our order B 1949, which went to the plant for fabrication. With reference to screen sections, one of

(Testimony of Karl H. Kaye.)

which is Exhibit A-27. It states that it was made, completed on February 6 at 11.8 in the morning on February 9, 1948, and that on February 10, 1948, it shows a cancelled mark, and with an attached memorandum, supplemental orders, it was cancelled, and other correspondence of why it was cancelled and that the size was wrong. It was ordered by the Westfell Equipment Company, Portland, Oregon, to be shipped to the Springfield Sand and Gravel Company, Springfield, Oregon.

(Defendants' Exhibit A-28 received in evidence.)

LOREN THACKER

called as a witness by and on behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

In answer to questions by Mr. Catlett, the witness stated:

My name is Loren Thacker. I reside at Port Blakely, Bainbridge Island. My present employment is as production manager of Pacific Wire Works. I have been in that position approximately five months. I have under me the manufacturing of these wire screens. I had something to do with the selection of these single wires here, A-9 and 10 and on up. They came from our racks we used to hold the loom ends left from previous orders

(Testimony of Loren Thacker.)

that have been woven up and shipped. They were not made up in any way for the purpose of this trial. They are out of stock. They are right [171] out of our regular stock of loom ends, right out of the racks.

I had something to do with the making up of Plaintiffs' Exhibit 2. The order came through my office and because of the small size of the screen it was made up from loom ends. I directed the matter of making this screen up with loom ends with the spring steel foreman. That screen was made from these double dies that are just behind Mr. Conant there on the floor. I don't know the number of them.

(Invoices marked Defendants' Exhibit A-37 for identification.)

Defendant's Exhibit A-37 are the office copies of an order for making up a screen of 1½ inch opening, 3/8, Pacific 4-S wire screen. Its date is 9-21-49. That has attached a letter from the purchaser, Mr. M. T. Bowie. These are the office and file copies of the order under which this screen was made up. The order was actually made from the yellow shop copy. These two pieces were not used in the shop in the making of the order. I recognize them as our documents, documents of my company, and there are an original and carbon of the shop order.

(Defendants' Exhibit A-37 received in evidence.)

(Testimony of Loren Thacker.)

Cross-Examination

In answer to questions by Mr. LeSourd, the witness stated:

As to whether if I had several loom ends from my regular stock that were the same size, say $11\frac{1}{2}$ by $\frac{3}{8}$, could I weave them into a completed screen, you would have one thing to look for, and that would be that they were both punched on the same machine. The difference would be evident in the markings. The fact that there are slight mechanical differences in those separate machines and in those separate dies might make it difficult to weave them. If they were from the same die you could weave them. I can tell by looking at a wire which die it is from. Exhibit A-13 is one [172] made from our new punch. It is a 40-ton punch. It is described in one of the photographs that have been brought in here. I don't know how else to explain it. This is a single die. The other one is a double die. This is from a single die. A 16 is made from the double die. I wouldn't say it would be impossible to weave the screen with those two rods. I don't mean to say it would be impossible. I mean to say you probably wouldn't. I think you probably could satisfactorily. We don't normally, but I would say you could. Since these two are the same openings, that means it would be the same distance between the crimps. If the openings are the same, the rods are the same size. These are not

(Testimony of Loren Thacker.)

the same openings. You could not weave a screen with those two rods if they are not the same opening. These are not of the same opening. I would say from the appearance of it and the measurement I made of one crimp that it is not of the measurement of one and one-half by $\frac{3}{8}$.

GEORGE HEYER

called as a witness by and on behalf of plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination

In answer to questions by Mr. LeSourd the witness stated:

My name is George Heyer. I reside at 5936-44th Avenue Southwest. At the present time I am a repair man for electrical appliances. I have worked for Mr. Kaye, the defendant in this action, starting about 1940 to about four days after the war was over, in the year 1945, that was in August of 1945. I originally worked there in 1929, I believe, right after I graduated from high school. Then I came back in 1940 and I worked upstairs part of the time, roughly better than a year, and the balance of three years I worked downstairs. When I worked upstairs for better than [173] a year, I made screens, welded. I wove some screens, some of them I formed the wires for, fed them out of the bundle. I worked downstairs for the next three years. Downstairs they have three weaving ma-

(Testimony of George Heyer.)

chines operated by power for making ordinary small mesh wire cloth. I operated all three machines.

My father was formerly employed by the defendant. He was a foreman for 24 years. I am familiar with the screen that Mr. Kaye sells that he calls his Pacific 4-S flat top. Plaintiffs' Exhibit 2 is of the type to which I refer when I speak of Mr. Kaye's flat top variety. I know of my own knowledge that Mr. Kaye made screens of this flat top variety prior to December of 1944. I personally opened up bundles, cut the wires off with an acetylene torch and straightened the wires out on those screens previous to the time I went downstairs. That would be about the middle of 1942. The work that I described was an incident to the manufacture of one or more of the flat top screens. As to the quantity in which these flat top screens were manufactured at that time, that is a hard question to answer. There was a lot of work during 1941 and 1942 and I have no way of remembering how much was done. There was enough of them that I can say that I remember doing the work on them. There was more than simply an occasional one or two.

I did not spend time weaving flat top screens. I only had worked on one part of it, either cutting the wires out or straightening them. I only worked on part of the formation of those screens. The actual weaving I don't recall doing. Possibly once we bolted it on the bench and drove it together with a hammer. [174]

SAMUEL H. PALMER

called as a witness by and on behalf of plaintiffs, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. LeSourd:

Q. The Court during the progress of this trial has asked some questions with respect to the length of the radius of the arch of the screen in your invention. What determines the length of the radius of the arch in the screen that you have patented?

A. Well, we——

The Court: If you could just say directly what determines it.

The Witness: The length of the radius must be as long as possible to make the screen as flat as possible and still short enough to——

The Court: You haven't answered that. Try to consider the question and don't go rambling off to something else. Read the question.

(Last question read by reporter.)

Mr. LeSourd: If the Court please——

The Court: It didn't answer anything to the Court. [501*] You may note an exception if you wish. Proceed.

The Witness: What determines the radius of the arch is that the crown of the arch must extend to the bottom of the opposite cross wire, the next

* Page numbering appearing at bottom of page of original Reporter's Transcript.

(Testimony of Samuel H. Palmer.)

cross wire, and eliminate as much of the short crimp as possible, but still have sufficient tension there to give it a spring tension to hold it in place, and it also must be short enough to prevent the cross wire that lays in the convex downward curve of the arch from shifting, to prevent it from shifting.

Q. When you said to eliminate the crimp, to what were you referring, which crimp?

A. To eliminate that sharp bend as shown in the Potter, for the reason so we can use a high carbon steel without fracturing it.

Q. Then you say that the radius must be as long as possible to get it as flat as possible which—

A. And it also must be short enough to prevent the wire that lays under the crown of the arch from shifting.

Q. And you mentioned something with regard—

A. And it should be brought down to the bottom of the intersecting cross wire, and it should be brought down as quickly or sharply, but still not sharp enough to fracture the wire where the shallow crimp that connects the arches together. [502]

Q. Then you say the radius must be short enough to bring it down in that manner without this Potter bend, is that what you are saying?

A. Yes.

Q. You said, I believe, that it had to be short enough to give support against shifting of the transverse wire under the arch?

(Testimony of Samuel H. Palmer.)

A. That's right.

Q. And you said that it otherwise——

Mr. Catlett: I object to testimony by counsel.

The Court: The objection is sustained. If you could get him to answer the first question, I am still ready and willing to listen to the answer. I have not heard it yet.

Mr. LeSourd: In our opinion, if the Court please, the answer he was about to give and did give is the answer that is the definite functional answer in the claim of these patents.

The Court: I think he has rambled around and made some remarks, but has not answered the question. I advise counsel that the Court still feels a direct answer would assist the Court. I do not believe that what has been said does so. This is rebuttal. I think his answer should be direct and to the point.

Mr. LeSourd: That is what the witness is [503] attempting to do, if the Court please. I feel that he has answered the question directly.

Q. In other words, Mr. Palmer, are there three elements that determine the length of the radius of your arch?

A. Yes, there are three elements.

Q. State those three specifically?

A. (1) It must prevent the wire from shifting at the crown of the arch.

Q. That has to do with the longness or shortness of the radius?

A. That's right.

Q. Which?

(Testimony of Samuel H. Palmer.)

A. It has to be done with the longness of it, or the shortness of it. Pardon me.

Q. It has got to be short enough to prevent the wire from shifting?

A. Then according to your mesh, it must be long enough, as long as possible without losing that particular leverage.

Q. And what is the third factor?

A. It should be brought down almost—I don't know just how to explain that, but as quickly as possible, but do not eliminate the sharp bend at the bottom of the crimp or the arch of the crimp that joins the two arches [504] together.

Q. And that has to do with the longness or shortness?

A. That has to do with the longness of it.

Q. You mean it must be long in order to bring it down in the manner you speak of, or short?

A. It must be as long as possible, but still short enough to bring it down not too rapidly, but as rapidly as you can without necessitating that sharp bend as shown in the Potter patent at the bottom of the next cross wire.

Q. There was some testimony by Mr. Kaye to the effect that you had stated that your crimp is of a depth of $\frac{2}{3}$ of the diameter of the intersecting wire. Did you ever state such a thing?

A. No. I think my intention was to say the crimp was about $\frac{2}{3}$ of the radius of the wire, the inside of the crimp is $\frac{2}{3}$ the radius of the wire.

(Testimony of Samuel H. Palmer.)

Q. Of the intersecting wire? A. Yes.

Q. Is that the depth of the crimp or the radius of the crimp?

A. That is the radius of the crimp.

Q. So that your statement was what?

A. Well, the crimp is brought up in a gradual——

Q. With reference to this $\frac{2}{3}$ business. What is this $\frac{2}{3}$ business? [505]

A. It is approximately $\frac{2}{3}$ the radius.

Q. What is approximately $\frac{2}{3}$ the radius?

A. The inside or concave of the arch.

Q. What arch?

A. Of the crimp, is approximately $\frac{2}{3}$ the radius of the wire.

Q. Of the intersecting wire?

A. In other words, we grind that punch about $\frac{2}{3}$ radius of the wire and that determines the radius of your arch.

The Court: Does he mean radius of the wire or does he mean diameter of the wire?

Mr. LeSourd: The radius of the wire, if the Court please. That is what we are trying to make clear.

The Court: You have not, and I am trying to keep you abreast of the Court's difficulties. That is one object of my making these statements. I was hoping it could be done on rebuttal.

Mr. LeSourd: That is what we are attempting to do.

(Testimony of Samuel H. Palmer.)

The Court: I advise you it has not been done yet and I appreciate any assistance.

Mr. LeSourd; May I inquire whether from the witness' testimony it is clear—— [506]

The Court: There isn't anything about his testimony on rebuttal up to this time which is clear to me. I would be glad if he could give some information about what it is that controls the formation of that arch, what determines its size, what determines how slanting or curving the degree or height of the curve, or generally, the shape of the arch in the varying sizes of meshes, and in the varying sizes of the wires which are used in making the screen, anything that would tend to establish a fixed principle which enters into the formation of that arch.

Does he have a positive, definite, rigid mold into which he forms and bends and shapes the wire, or is it merely an arch or parts of an arch which are formed as and only as the screen is woven, without reference to any fixed, limiting molding or forming die? Those are some of the questions that are in the Court's mind, and I have tried to bring them out during the trial, and they are still unanswered in my mind.

Mr. LeSourd: I realize that fact, and it was the purpose of my first question to answer that question, and I thought that the answer is self-evident in the patent, which fixes the radius of that [507] arch, was what Mr. Palmer has testified to in that

(Testimony of Samuel H. Palmer.)

it wants to be as long as possible and yet must be short enough to come down underneath the next transverse wire without a sharp bend such as in the Potter, and short enough to give lateral support.

The Court: That statement concerns the results desired. It does not concern the method of achieving it.

Mr. LeSourd: If by the testimony we have made clear what I have just stated, then I do not wish to pursue that point further at this time. If I have not made clear from the testimony the statement I just made, I would wish to pursue it further.

The Court: You may not assume that anything is made clear respecting the subject matter of my inquiry or statement.

Q. Mr. Palmer, in making a screen of this type, is it or is it not necessary for the wire which runs one direction in the screen to pass over and then under the wire which runs the opposite direction?

A. Yes.

Q. If you make what we have called the connecting link between the two crimps flat across all the way over or almost all the way over to the next two intersecting wires on each side, then what is the nature of the [508] formation that would be necessary in order to bring that wire down underneath the intersecting wire under which it must go?

A. You would have to arch it sufficient to bring it down.

Q. I am asking you to assume that you are making it perfectly straight across from one inter-

(Testimony of Samuel H. Palmer.)

secting wire across the top of the next and over to the next intersecting wire or close to it. Then what would you have to do with that wire in order to get it down under the wires on each side under which it must pass? A. It must be formed.

Q. Formed in what shape?

A. Formed in the shape of an arch, and that arch must be deep enough in order that you may weave it together, weave the screen together. The short crimp lies in the crown of the arch and that arch must pass through this short crimp down to the bottom of the intersecting wire, and it must be left as flat as possible, but still sufficient arch there to prevent the shifting of that wire, and when that arch is joined to the short crimp which is fastened—which rests under the intersecting wire, it puts a tension on the cross wire.

Q. Maybe I can shorten this. You are familiar with the Potter patent, are you not? [509]

A. Yes, sir.

Q. Do you recall in the Potter patent that the wire runs straight across in this connecting link from one side to the other, is that true?

A. That is true.

Q. How in the Potter patent is the wire brought down from that straight part around the two intersecting wires on each side?

A. By eliminating the sharp bend.

Q. You say that the Potter eliminates the sharp bend?

(Testimony of Samuel H. Palmer.)

A. No, I say that is the way we make the arch.

Q. I am asking you how Potter does it, not how you do it. Does he or does he not put a sharp bend in the wire?

A. He puts a sharp bend in the wire.

Q. Does he or does he not bring down the wire from the flat surface by means of a sharp bend?

A. That's right.

Q. Is it necessary if you do what Potter does and having a perfectly straight wire across between the two transverse wires and over the third transverse wire, if you have a perfectly straight wire clear across there, is it necessary to have a bend like the Potter in order to bring your wire down under the two transverse wires? [510]

A. That's right, it is necessary.

Q. Is it or is it not an object of your invention to eliminate that sharp bend?

A. That is one of the improvements.

Q. That is one of the improvements?

A. Yes.

Q. How do you eliminate that sharp bend?

Mr. Catlett: If your Honor please, I raise the question that this doesn't seem to me to be proper rebuttal.

The Court: I am not going to restrict him, because it may be a very careful and accurate method being employed by examining counsel to try to get at the principles which control this arch, and that is what I want to learn if I can from this evidence.

(Testimony of Samuel H. Palmer.)

Mr. Catlett: I had thought Mr. Palmer went into that on his direct examination.

Q. Mr. Palmer, how do you then eliminate the sharp bend that occurs in the Potter screen?

A. We eliminate the sharp bend by shortening the depth of the crimp and bringing from the center wire—well, to make it short, we just shorten off that sharp bend and make an arch out of it. The material that goes into that sharp bend is spread out into a more gradual bend. [511]

Q. In other words, you bring it up without the bend, is that what you are saying? A. Yes.

Q. In order to do that, in order to bring that wire up from below the transverse wire without the sharp bend, what is necessary with relation to the formation of the link on top?

A. We must bring it up as rapidly as possible but eliminate that sharp bend to give as much material as possible to the wearing surface of the screen, which would be the top of the arch.

Q. Then with reference to the length of the radius of your arch, you say that you bring this wire up as rapidly as possible but still eliminate the bend. With reference to the length of the radius of the arch, how do you translate what you have just said into the length of the radius of the arch?

A. The radius of the arch wants to be made as long as possible but still——

Q. Right there, making the radius of the arch as long as possible, would that make the top of the screen—— A. More flat.

(Testimony of Samuel H. Palmer.)

Q. More flat. Does that have anything to do with the quickness with which the wire is brought up from underneath the transverse wire? [512]

A. Yes, it does. We shorten that.

Q. In other words——

A. We shorten the crimp, make more of an angle to it.

Q. The longer the radius, the faster it comes up, is that right?

A. The longer the radius, the faster it rises.

Q. In the Potter where radius is carried to the extreme of a straight wire, what happens in bringing that wire up?

A. You mean what happens to the wire?

Q. Yes, what formation does the wire take in coming up from the bottom?

A. It forms a deeper crimp, more of a cup with sharp bends.

Q. It forms a sharp bend, is that what you want to get rid of?

A. That is what we must eliminate.

Q. So you say you want the radius as long as possible and yet you want to eliminate the sharp bend?

A. That's right.

Mr. Catlett: I object to counsel's testifying. He is putting words in the witness's mouth.

Mr. LeSourd: I am trying to clarify the issue by saying what the witness has said. [513]

The Witness: I think that is covered in the specifications of the patent.

(Testimony of Samuel H. Palmer.)

Mr. LeSourd: Just a moment, Mr. Palmer.

The Court: The objection is overruled.

Q. Is there or is there not a limit to the length of the radius of the arch employed by you to eliminate the sharp bend that occurred in the Potter patent? A. Yes.

Q. And how short—what is the limitation showing how short the radius of the arch must be?

A. The radius must be short enough to form resistance to the wire that lies in the center of the convex part of the arch to prevent it from shifting.

Q. Is there any relationship between the shortness of the radius and the sharp bend that occurs in the Potter?

A. Yes, it must be short enough to eliminate some of that bend also. It really has two factors in keeping it down as much as you can, as short as you can, and that is to eliminate that bend, that sharp bend, and also to prevent the transverse wire, or what we call the shot wire or cross wire, from shifting, which is right angles to the arch.

Q. There are various sizes of openings and sizes of wire which have been testified to here. If you apply these factors concerning which you have testified to [514] different sizes of openings of wires, does it or does it not produce a different radius of that arch? A. Yes.

Q. Yes what?

A. Yes, it does produce different radius of the arch.

(Testimony of Samuel H. Palmer.)

Q. In any given size of opening with any given size wire, do the factors to which you testify produce a certain and predictable radius of the arch?

A. Yes, it does. On account of being such a long arch, I might add that sometimes the characteristic of the wire may change that partially, but when you weave it up, it takes its regular form. They all come out the same.

Q. So that in any size opening, in any size wire, can you in any size opening, any size wire, find definitely from the factors to which you have testified what the radius of the arch would be under your invention?

A. You mean the exact radius by inches? We use the same formula on all, because it is impossible to measure it in a mathematical form.

The Court: How would you state the formula? That is what I have been asking about ever since you started to talk about this case. How would you state the formula so that a stranger who never heard of [515] this subject could take that formula and work out an example such as one of those down there on the floor?

The Witness: You set your punch and bring it down to——

The Court: I wouldn't know how to set up a punch. I would need some facts by which to set up a punch. Your statement assumes that somebody already knows a lot about punches and things like that, does it not?

(Testimony of Samuel H. Palmer.)

The Witness: Yes, I presume it did. I wouldn't know just how to explain it to you so you could understand it right away, but this punch must be set down so when the tooth comes down into the die, it brings the wire out in practically straight form according to your die, and the way that arch is regulated, if that is what we want to know, if it is done by adjustments in the die. It brings the sections down when the punch comes down onto the wire, the ends would have a tendency to rise and you have an adjustable stop there or you can have a fixed stop if you change your dies for every mesh.

The Court: Suppose you wanted to mold an arched keystone to put above a door. You are going to make it out of clay and afterwards bake or burn [516] the clay so it would be solid. You wanted to make it on a certain angle, would there be any way you could state a formula for it, and if so, does that principle have any relationship to this arch that you contend you can build under the patent claims?

The Witness: No, your Honor, I don't believe it would.

The Court: Have you any mold that is used by you in shaping your arch that is similar to a mold for shaping brick or clay products or anything of that sort?

The Witness: Those drawings of the dies that we have from Mr. Lippincott, it is made on the same principle with the exception that you make

(Testimony of Samuel H. Palmer.)

the teeth longer or shorter in order to arrive at the particular shape, and that is a fixed die.

Q. In that connection, I might ask a question or two on that particular point.

The Court: You may proceed.

Q. You have observed the dies that were produced by Mr. Kaye in this proceeding?

A. Yes, I have.

Q. In those dies, does he have a method of controlling the curvature of the wire, the radius of the wire and the arch of his screen? [517]

A. That is all we use.

Q. Answer my question. Does Mr. Kaye in these dies have a method of controlling the radius of the arch of his screen? A. Yes.

Q. In your own manufacture, how do you control the radius of the arch of your screen?

A. We control it by the two supports or pads, as he was calling it, or stripper plate.

Q. Is that the same way that Mr. Kaye controls his? A. Yes.

Q. Can you point out to the Court on these dies those particular plates that are used for that purpose?

A. I believe I can. On Exhibit A-3, we do not have these center flat blocks here. It would be replaced with teeth. The center don't mean anything. In principle, it is the same. This is the teeth, the push mark here. This plate and this plate.

Q. Referring to the center plates?

(Testimony of Samuel H. Palmer.)

A. The center plates will control.

Q. Of Exhibits A-34 and A-33?

A. Will control the shape of the arch. Your arch would be laying right—if that came down that far, the arch would be perfectly flat, but if it is fixed so it comes about like this, that would leave a rise in the arch [518] and you set that down until you have the right tightness in your crimp to give a spring tension when they are together, and if it goes down too far, your crimps and arches would be too deep and your wires loose and you would have a loose screen; therefore, it is almost impossible to give a formula, a certain formula for each space.

The Court: Respecting the length of the radius you have mentioned so many times that your link has to be a supposititious elastic strength, does it not? It cannot be a non-elastic radius?

The Witness: Your Honor, it must be fixed because your spring would not spring the same all the time but they can be regulated by the length of your teeth also, or put in a thicker plate if you want to remove the arch entirely, you would put in a 3/16 thicker plate in that one.

Q. You have testified you cannot express a mathematical formula for that radius, but I will ask you whether the three elements to which you have testified do or do not fix the shape of the wire and the radius of the arch with certainty insofar as practical manufacturing operations are concerned?

(Testimony of Samuel H. Palmer.)

A. That's right.

Q. In any screen of a same size opening and same [519] size wire and made out of the same kind of wire which you are testifying to, does the arch vary in the radius?

A. The arch would vary.

Q. To what extent?

A. According to the thick diameter of your wire and the space it must span.

Q. I am assuming that the diameter of the wire is the same size wire and the same size opening. Would or would not the arch be uniform in all screens of that type?

A. Yes, it would be uniform.

Q. Does or does not that result from the application of the factors to which you have testified?

A. Yes.

Q. There has been testimony concerning the nick placed in Potter type screens. Do you have any nick in your screen?

A. Well, we have eliminated the necessity of that nick by using the arch, and that was considered an improvement because the nick has a tendency to weaken the wire at that particular point.

Q. I will ask the bailiff to show you the file wrapper of the patent office which is in evidence as Plaintiffs' Exhibit 18. Mr. Palmer, at one time during the pendency of the patent proceedings on your patent, were the claims in your patent application rejected? [520]

Mr. Catlett: I am going to object to that sort

(Testimony of Samuel H. Palmer.)

of testimony. The roll itself shows and is the best evidence of anything happening in the application for a patent.

The Court: It is in evidence and is it not appropriate to inquire of the written document?

Mr. Catlett: It seems to me we should not enter into oral testimony, and that is what it seems to me this is leading to in connection with this transaction concerning this patent, because of course we would have no knowledge of anything of that sort. The patent of course speaks for itself and if there are any rejections, the wrapper shows it.

Mr. LeSourd: I think Mr. Catlett's objection is premature, because we haven't gotten to any such oral testimony at this time. The fact that the patent claims were rejected at one time is a matter of the witness's knowledge concerning which he can testify.

Mr. Catlett: But the best evidence of what was done to the patent claims is in the patent wrapper.

The Court: I am inclined to think you will not be able to over objection properly ask him to explain why the examiner first rejected and later allowed.

Mr. LeSourd: I did not intend to ask that question, if your Honor please. [521]

The Court: I will see what the inquiry is. The objection presently made is overruled.

Q. Were the claims in your patent application rejected at one stage in the proceedings?

A. Yes.

(Testimony of Samuel H. Palmer.)

Q. I refer to particularly Page 29 of the file wrapper and contents and ask you to state whether that is the rejection to which you refer?

A. That is one of them, yes, that is the one.

Q. In response to that objection, did you take any action?

Mr. Catlett: If Your Honor please, I am going to object. What action he took is evident in the wrapper. I don't think he can establish by oral testimony.

The Court: What do you propose to show now?

Mr. LeSourd: Well, I can come directly to the question I wish to ask, if the Court please.

The Court: It might save time.

Q. I will refer you to Pages 30 to 35 of the file wrapper and contents which set forth an amendment to the application and therein quotes at some length from a letter which states to be from the inventor's own attorney, various facts with regard to this invention. Were the facts which are stated in that letter supplied by you? [522]

Mr. Catlett: Just a minute, if Your Honor please. It doesn't seem to me that is important. Here is a letter appearing in a file from his own patent attorney. It speaks for itself.

Mr. LeSourd: I am asking if he supplied the facts.

The Court: The objection is overruled.

Q. Were the facts that are contained in that letter supplied by you?

(Testimony of Samuel H. Palmer.)

A. Yes, I supplied them to my attorney.

Q. Have you read that letter? A. Yes.

Q. Does the information therein set forth directly and correctly state the facts with regard to the difference between your invention, the prior art and structure and arches?

A. It is all the truth that is in there, yes.

Q. Those are the facts?

A. Those are the facts.

Q. I refer you also to Pages 25 - 28 of the file wrapper, which is an amendment also filed in your proceedings, and contains quotations from a letter with respect to your patent. Were the facts set forth in that letter supplied by you?

A. All of them.

Q. Does the information contained in that letter [523] truly and correctly state facts with regard to the difference between your invention and the prior art and structure and arches?

A. Yes.

Mr. Catlett: I am going to object to that. The witness is on the stand to testify to those things himself that would give me some opportunity to cross-examine him. Here you are just asking him if certain facts of a five and six page letter were supplied by him and whether they are correct. I submit that is not the correct way of taking testimony from a witness, certainly not in rebuttal.

The Court: I will overrule the objection.

Q. Mr. Palmer, I asked you to look at Plain-

(Testimony of Samuel H. Palmer.)

tiffs' Exhibit 2 and state whether or not there is in that screen a lateral resistance caused by an arch to the shifting of the transverse wire underneath?

A. Yes, there definitely is.

Mr. LeSourd: That is all.

Cross-Examination

By Mr. Catlett:

Q. Didn't you testify that you construct your wire to weave into your screen with a forming die?

A. Yes, with a forming die. [524]

Q. Then you use a die which forms your arch, don't you?

A. Not on the large openings, only on the finer ones. We have an extra tooth on the finer ones that gives it a little more kink.

Q. When you say "finer ones" what do you mean? A. The smaller ones, like $7/16$, $5/8$.

Q. We are talking about the ones from $11\frac{1}{2}$ on.

A. No, we don't have that.

Q. You don't use a forming die above that?

A. We use a forming die, but we don't have that plate in there because we only punch one at a time.

Q. You don't have the flattening plate or what?

A. We don't have the flattening plate on the long ones, pardon me.

Q. But you would have the forming die?

A. Yes.

Q. So that you form your arch?

(Testimony of Samuel H. Palmer.)

A. Well, we form it but not unlike the same principle. I will tell you the difference between our die and Mr. Kaye's. We have a die with the fixed tooth in the center, and the outside edges, where he has these pads, we have fixed teeth and that die is never changed. It is made for a particular opening with a particular size mesh. In other words, we have a die for each opening, separate die. [525]

Q. How do you control the uniformity of your arch?

A. By the length and shortness of those outside teeth.

Q. How do you control it to determine its uniformity so that it rises in a gradual curve?

A. You have a pressure coming into your die from the punch side, and on the die side, which is the bottom, if you want to call it the bottom, you have two teeth and when that pressure is applied to the wire, that extends across these two teeth and the punch coming down with these two teeth, it dents the wire and has a tendency to force the outer side of this die—the wire that extends outside of these teeth in an upward direction, and if your two teeth are set in the proper place, they will prevent that, that the pressure applied with a punch will put the dent in there and make the arch at the same time.

Q. Do you punch from above or below?

A. We punch sideways. Our punch works on a horizontal position, but I am saying bottom and

(Testimony of Samuel H. Palmer.)

top because I thought you would understand it better.

Q. When your punch goes down, if you don't have anything to hold it, it will naturally swing the ends of your wires up? A. Yes.

Q. If you have teeth to hold down ends of the wire, [526] it will produce an arch, won't it?

A. Teeth or stops, yes, it will, and you can regulate that arch by the length of those teeth or blocks, whatever you want to call them.

Q. That natural arch is formed with the punch, isn't it, when this punch comes down?

A. Yes, it is formed by the pressure.

Q. I thought you testified in your direct examination that you had a forming die that you used?

A. Well, that is a forming die, then we have another feature.

Q. What is that?

A. That is a straightening device that straightens the wire for the next operation. In other words, when you are running a wire through the punch machine, it travels every time the punch comes down the distance of your mesh.

Q. By the way, your punch is automatic, isn't it? A. Yes.

Q. Do you know Mr. Kaye's punch is not automatic?

A. Well, that don't make any difference as far as the feed goes——

Q. Is his a hand punch?

(Testimony of Samuel H. Palmer.)

A. Yes, but it does the same operation. Then we have a separate device in the same block that straightens [527] the wire. In other words, we do it all in one operation where he has to pull it through a set of rolls first.

Q. You straighten it before you punch it, don't you?

A. We do it at the same time. The straightening device is ahead, so I would say we form it after it is punched.

The Court: Does that straightening process have anything to do with the amount of the curve?

The Witness: No, it has absolutely nothing to do.

Q. Doesn't it affect the curve at all?

A. No, just so it is more convenient to handle. You couldn't pull the wire through if you didn't, it is too heavy, but we do eliminate one operation there.

Q. Isn't it true that in the die which Mr. Kaye uses, these plates that you refer to take out the arch and flatten it, isn't that true?

A. It should if it was set right, yes.

The Court: In other words, Mr. Kaye's process produces an arch just the same as yours does, only he has a second operation to press out the arch, isn't that right?

The Witness: Your Honor, the press can be set by those pads, as he calls it, and the length of the punch tooth, so when it comes down it will be perfectly flat. [528]

(Testimony of Samuel H. Palmer.)

The Court: So in spite of himself, if he crimps a wire with a punching machine, he thereby necessarily creates a corresponding arch in the connecting link between the crimps, does he not?

The Witness: I don't see how he can do otherwise with the equipment.

The Court: And he is bound to, just as you do, have in the connecting link by the crimping process a formation of an arch unless and until he later or in some other pressing straightens the arch out?

The Witness: That's right. That is where my patent differs from the Potter.

The Court: So does it not follow that there is nothing peculiar or distinguishing in your process of shaping the wire that his process does not do?

The Witness: From the information that I have, I would say no, it is all done on a punching machine.

Mr. Catlett: That is all.

Redirect Examination

By Mr. LeSourd:

Q. Would you state whether or not with Mr. Kaye's dies as shown here that he can regulate the shape of his arch?

A. I would say he could, yes. [529]

Q. How does he do that with these dies?

A. You can do it by putting your blocks a little closer to the punch. That is what holds your wire down the stripper plate and if you let that come up, it will make an arch in it, or if you put them

(Testimony of Samuel H. Palmer.)

too far apart, it will make an arch, but if you bring those up closer together and set them so it will squash it down, you could make them just like the Potter screen. We can do it. I made the Potter sample there on the same machine.

The Court: Take the Potter patent principle, if you did not have an additional machine or press to straighten out the arch under the Potter patent in making the crimps, you would have the same arching process which you have under your patent, would you not?

The Witness: I don't think you would as long as the die is made the way it is. You could by changing some of the teeth in it.

The Court: Making the crimp a little more shallow?

The Witness: That's right.

The Court: The principle is no different, is it?

The Witness: There is no arch in that wire when you put it through the machine, because it is already straight. It is the pressure of the punch coming down and the wires raising up on the outside of the die [530] that would put the arch in it.

The Court: You could with the defendant's press just as effectually and accurately form the arch which you claim is formed by your press as you could by using your press, could you not?

The Witness: I am quite sure we could; in fact, I am sure we could.

The Court: And repeating, in order to avoid having an arch such as you get, you have to have

(Testimony of Samuel H. Palmer.)

an extra function in your die to press the arch out and straighten it out after it forms?

The Witness: If you bring those pads closer together, closer to the punch, you wouldn't get an arch but you would have to lengthen your punch to get it a little deeper, get depth enough so that you could weave the screen together.

The Court: The same thing is true in the Potter patent process, is it not?

The Witness: The Potter is made exactly like that.

The Court: Would it not also be true in the Galloway process?

The Witness: That Galloway is a little different. That can be pressed, but the only bad feature about the Galloway is that it has such short crimps that you [531] can't use it on a high carbon wire without annealing it and heat treating it afterwards. I think that has been stated in some of the depositions, and that would add about 50 per cent, at least 50 per cent to the cost of fabricating it.

The Court: So far as unavoidably producing in the first place by the crimping process a resulting arch in the link between the crimps, the Galloway process would have the same results as your process, would it not?

The Witness: That was one of the amendments in our claim, I believe, to the Patent Office and we show them where we eliminated those three projections.

Mr. Catlett: I object to the testimony as to——

(Testimony of Samuel H. Palmer.)

The Court: I am not talking about projections. I am talking about whether there is any difference in the effect so far as producing an arch is concerned between the Galloway crimp punching process and your crimp punching process.

The Witness: No, it could be done on the same machine by just adding two more teeth.

Q. On that last matter, you say it can be done with the same machine by adding two more teeth?

A. That is on the Galloway.

Q. The Court used the words "forming an arch unavoidably." Is it or is it not possible in one operation [532] by a properly formed die to press in a crimp such as we are talking about here and prevent any arch from forming at all?

A. Yes, very easily. I could refer to one of those drawings and explain it to Your Honor if you wish.

The Court: I will be glad to have him do that after you have finished.

Q. One of Lippincott's drawings, are you speaking of?

A. I don't think it makes much difference. I could show him on any of those.

Q. The drawings of Lippincott's dies?

A. Yes.

Q. A-1—A-4 inclusive?

A. Here is one, Your Honor, that does not have the nick in it. This would be the Potter patent. This tooth comes down here and puts the crimp.

(Testimony of Samuel H. Palmer.)

The Court: Step down to the counsel table. Referring to Defendants' Exhibit A-2 in evidence.

The Witness: This is down through the center of the wire in the press and shows the natural form that is being put into it in one operation. This here is the die, and this is the punch, and this whole member raises up and comes down, and when this comes down, this pushes this wire down in here.

The Court: Thereby forming the crimps?

The Witness: Thereby forming the crimp. This next tooth——

The Court: Immediately to the left?

The Witness: Immediately to the left is the stop tooth.

The Court: To stop what?

The Witness: To stop this wire from raising up and holding it down.

The Court: Stops it from bowing it up and forming an arch?

The Witness: Stops it from bowing up and forming an arch. If you want to make an arch, all you have to do is to shorten this tooth and let the wire come up to that point.

Mr. Catlett: In other words, without the tooth which occurs between the punch, you would have a natural arch formed?

The Witness: Yes, you would have more of a natural arch but that is not a natural arch because it is forced up from this point.

Mr. Catlett: Because the tooth underneath——

The Witness: There is no such thing as a nat-

(Testimony of Samuel H. Palmer.)

ural arch in a straight rod. It has to be put there or it wouldn't be there. [534]

The Court: Is that because of invention, or is that the result of producing the crimp in the wire?

The Witness: That is part of the invention. It prevents the shifting of the wire without putting the nick in it.

The Court: In order to prevent obtaining the arch result, you have to enforce a mechanical resistance to it, is that not right?

The Witness: You are doing that anyway.

Mr. Catlett: He is referring to this other point.

The Witness: This just prevents the arch from forming.

The Court: The arch would form without any inventive arrangement?

The Witness: It would, but it wouldn't be true. We regulate the height of the arch by the length of this tooth. You could do it by shimming up this plate, in fact it has been shimmed. You can see the shims in here.

Q. Would those shimmings regulate the formation of that arch?

A. That's right, and it also regulates the depth.

Q. When you are speaking about Mr. Kaye's dies with the shims regulating the formation of the arch, you [535] were speaking of Defendants' Exhibits A-33 and A-34, were you not?

A. That's right.

Q. On Exhibits A-33 and A-34, by the regula-

(Testimony of Samuel H. Palmer.)

tion of the height of those bars or seams, does Mr. Kaye or does he not regulate the shape and formation of the arch? A. Yes.

Mr. Catlett: Let's be accurate. Calling your attention to these again, does he not by these plates eliminate the arch?

The Witness: No. He would if it was set down so there was just room enough for the wire between here and here.

Mr. Catlett: You mean it would be absolutely flat?

The Witness: Yes.

Mr. Catlett: Isn't the effect of these plates upon that die to take out the natural arch which would form otherwise if it weren't there?

The Witness: If it was thick enough, but that way it regulates the height of the arch.

Mr. Catlett: Isn't the effect of those plates to take out at least a portion of the natural arch which forms?

The Witness: I hope it is, because otherwise——

Mr. Catlett: Well, isn't it?

The Witness: Yes.

Q. Otherwise what?

A. He would have a crooked screen, his arches wouldn't be uniform.

Q. If you left as he calls it the natural arch in it?

A. You wouldn't get it together because it would be too loose.

(Testimony of Samuel H. Palmer.)

Q. Is it or is it not part of your invention that the shape of this arch is regulated in the manner which you just pointed out so as to achieve a formation and a radius of the arch in accordance with the three factors to which you testified earlier?

A. That's right. If you do not regulate the arch, you would have a very uneven screen and it would not fit. You would have loose and tight spots all the way through it.

Q. Do you know of anything in the art in the production of wire screens where the shape of the arch was not regulated?

A. No, I do not.

Q. What effect would it have if you set your die so as to take the arch out entirely, what effect would it have on the shape of the crimp? [537]

Mr. Catlett: I believe that has been covered again and again.

The Court: The objection is overruled.

The Witness: It would make it too sharp, it would make the crimp sharp like in the Potter patent. I might say that is a disadvantage for the reason that you cannot use as hard a wire where you bring it up gradually.

Mr. LeSourd: That is all.

Mr. Catlett: That is all.

The Court: You may step down.

(Witness excused.) [538]

FRANK E. ESSLEY

called as a witness by and on behalf of plaintiffs, having been previously duly sworn, was examined and testified as follows: [188*]

Direct Examination

In answer to questions by Mr. LeSourd, the witness stated:

I testified on prior examination that I was with Roebling from 1920 to 1945. During the time that I was with Roebling I never saw a screen manufactured by them of the type of Exhibit A-5, which was sent out with the deposition of Mr. Lippincott. It did not appear during that time in any catalog I ever saw.

The second catalog of Plaintiffs' Exhibit 17 is a catalog of Roebling's aggregate wire screen copyrighted 1947. I got this from the Portland office of John A. Roebling. I got it as soon as it had arrived in Portland. I happened to be in the office a couple of days after they had received these catalogs and they gave me one. That was in the latter part of 1947. There is not shown in this catalog any screens similar to defendants' Exhibit A-5.

The third volume of Plaintiffs' Exhibit 17 is the catalog of Roebling's wire cloth and wire screening, reprinted with revisions, 1948. I got that from the Portland office of John A. Roebling's Sons Company. I have examined this exhibit and do not find in it any screen similar to that of Defendant's Exhibit A-5. I have also examined the first volume of

* Page numbering appearing at bottom of page of original certified Transcript of Record.

(Testimony of Frank E. Essley.)

Exhibit 17 and there is no screen shown similar to Defendants' Exhibit A-5.

(Plaintiffs' Exhibit 17 is received in evidence.)

I know of no catalog of Roebling's prior to 1947 which contains a flat top type screen. I have examined the screens being used on the McNary Dam project. I found some of Mr. Kaye's screens there. Some of Mr. Palmer's screens are being used there. I have examined both Mr. Kay's and Mr. Palmer's screens on the job. I couldn't find anything that was different about them. In fact, if the screens did not have tags on them I couldn't tell [189] which was the Western Fence and Wire Works screen and which were the Pacific Wire Works screens. The screens of Mr. Kaye's at McNary Dam were similar to Plaintiffs' Exhibit 2, in the fact that they were made with a short gradual crimp and elongated arch.

Cross-Examination

In answer to questions by Mr. Catlett, the witness stated:

I do not know whether Mr. Kaye sent in any inch and a half screens to the McNary Dam. I don't know that he didn't. I don't know anything about it. I do not believe I know Joseph E. Lippincott. I might have met him while I was at the factory. I probably met him but I don't remember. I have been a salesman out here on the coast.

(Both the plaintiff and the defendants rested and at 4:30 o'clock p.m. Friday, October 21, 1949, proceedings recessed until 2:00 o'clock p.m., Monday, October 24, 1949.)

October 24, 1949, 2:00 o'Clock P.M.

The Court: In the case on trial, you may proceed with the arguments at this time.

(Arguments made by counsel on behalf of plaintiffs and defendants.)

The Court: Mr. Palmer upon final questions put to him during the rebuttal testimony in effect testified that the arch, which is claimed by him as one of the patentable features under the plaintiffs' patent, is formed as an incident to the crimping process. It was spoken of at various times during the testimony as possibly being capable of some control by applying counteracting pressure [190] during or after the making of the crimps, but there is no statement of a definite formula to accomplish the desired curvature of the arch, either in the patent claims or in the evidence.

Essentially, the forming of the arch to accommodate the resulting pattern of the screen is not primarily the thing which is manufactured, but it is a by-product of the thing which is manufactured. The crimp is the primary product of the manufacture.

In a way, the plaintiffs' making of the arch while putting crimps into the wires might be likened to

the making of sawdust in the manufacture of lumber. The log is applied to a saw which strips the log into planks or boards, and in doing so sawdust falls by the way. And so in the crimping of the steel spring wire for the purpose of forming in it grooves to serve as seats for transverse wires, there is in the connecting wire between the crimps a resulting arch produced by the crimping process. The plunger in the press which makes the crimp may be pressed down hard or less hard to produce a deep or shallow crimp, but there is nothing mechanically planned or done to produce an exactly shaped or curved arch so far as any stated principle is concerned. There is no explicit, certain formula or governing principle for the making of plaintiffs' patented curve or the crimp.

It is not possible for a stranger, however skilled, to know with certainty how to employ plaintiffs' statement of principles for producing the Palmer patent crimps and arches. Likewise, a stranger to the patent cannot from any statement in the patent claims know exactly how to produce or to avoid producing the patented articles of the plaintiffs.

Connected with the patent claims or evidence of principles involved in the making of plaintiffs' patented article, [191] there is no exact mathematical or mechanical formula or description to guide the patented manufacture of a specific rock screen with exactly sized wire and with a definitely sized mesh of screen. There is to be found in plaintiffs' patent claims and evidence no statement of exact depth of

the crimps nor of controlling curvature angle or radius of the arches in the plaintiffs' patented screen.

The overwhelming weight of the testimony produced in the case convinces the Court that this curve, the by-product of crimp production in the wire, has been known to the art for a period of time extending back materially before the plaintiff claims to have invented that curve, and the way it was dealt with by some manufacturers was to apply a counteracting force to keep it from forming, or after it was formed in the production of the crimp it was pressed out again. The Galloway patent process clearly shows the same principle of an arch as that claimed in the plaintiffs' patent, and the Galloway patent was prior to the plaintiffs'. The Potter patent process found the same arch formation in the connecting link of wire between the crimps, but it was usually pressed out after it formed, or by counter pressure the arch was prevented from forming.

There was nothing definite done by the plaintiff under the plaintiff's patent to determine the exact formation of the arch to accommodate its binding effect upon the transverse wires in the screen manufacture varying with the different size of screen mesh desired. There was nothing peculiar to the sizing of the meshes that was definitely left undone by the plaintiff in the patented process under the plaintiff's patent, which controlled the curvature of the arches.

It is obvious by an examination of these exhibits,

several different ones, that as the size of the mesh increased, [192] the curvature was less pronounced, and therefore it must be obvious that the binding effect of the arch upon the transverse wires lessened as the size of the mesh increased. At any rate, no stranger could take any statement among the claims stated in the plaintiff's patent or any statement made by plaintiff Palmer in his testimony and by the aid of such statement either certainly construct a woven wire screen conforming exactly to any Palmer patent screen or certainly avoid constructing a screen when made which would not infringe the screen claimed to be patented under the plaintiff's patent.

There is no invention in either the crimp or the arch claimed to be patented under the plaintiff's patent. There is nothing new or useful in the principles of such crimp and arch not known or used in the prior art.

The Court finds, concludes and decides that the plaintiff's patent has no validity and, if the Court is wrong in that finding, that there is no infringement of plaintiff's patent by anything done by the defendants and complained of in this action.

(At 4:50 o'clock p.m., Monday, October 24, 1949, trial proceedings concluded.)

Receipt of copy acknowledged.

[Endorsed]: Filed March 1, 1950. [193]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT
COURT TO RECORD ON APPEAL.

United States of America,
Western District of Washington—ss:

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 11 as Amended of the United States Court of Appeals for the Ninth Circuit, Rule 75(o) of the Federal Rules of Civil Procedure as amended, and designation of counsel, I am transmitting herewith all of the original pleadings and documents on file and of record in said cause in my office at Seattle, as set forth below, and that said pleadings and documents together with Plaintiffs' Exhibits numbered 1 to 21, inclusive, and Defendants' Exhibits numbered A-1 to A-37 inclusive, introduced in evidence at the trial of said cause constitute the record on appeal from the decree for defendants filed and entered November 14, 1949, to the United States Court of Appeals for the Ninth Circuit, to wit:

1. Complaint. U. S. Letters Patent No. 2074665.
2. Summons with Marshal's return thereon.
3. Appearance of defendants.
4. Answer of defendants.
5. Note for Assignment Docket.
6. Consent to Filing of Amended Answer by Defendants.

7. Amended Answer.
8. Deposition of J. E. Lippincott, behalf defendants.
9. Deposition of L. W. Jones, Jr., behalf defendants.
10. Bill, Catharine A. Cawley, stenographic services, \$20.00
11. Cross-Interrogatories to be proposed to L. W. Jones, Jr.
12. Affidavit of Catharine A. Cawley, to Jones deposition.
13. Deposition of Frank M. Guess, behalf defendants.
14. Subpoena, Barney M. Rose, with Marshal's return.
15. Subpoena, M. T. Bowie, with Marshal's return.
16. Stipulation re trial of question of infringement first.
17. Trial Brief of defendants.
18. Memorandum Brief of Plaintiff on Points and Authorities.
19. Findings of Fact and Conclusions of Law.
20. Decree for defendants, filed and ent. Nov. 14, 1949.
21. Plaintiffs' Proposed Findings of Fact and Conclusions of Law.
22. Court Reporter's Transcript of Court's Decision.
23. Motion plaintiffs for new trial.

24. Statement of Reasons and Authorities in Support of Motion for New Trial.

25. Order Denying Motion for New Trial.

26. Notice of Appeal of Plaintiffs. (Copy of Clerk's letter transmitting copy to opposing counsel attached.) (Filed 12/13/49.)

27. Bond for Costs on Appeal. (St. Paul-Mercury Indemnity Co., \$250.00.)

28. Notice of Appeal of plaintiffs (filed Dec. 20, 1949). (Copy of Clerk's letter of transmittal of copy attached.)

29. Court's Decision on Plaintiffs' Motion for New Trial.

30. Motion of Plaintiffs to Extend time for Filing Record on Appeal.

31. Order Extending Time for Filing Record on Appeal to Mar. 13, 1950.

32. Court Reporter's Transcript of Proceedings at Trial.

33. Plaintiffs' Designation of Record on Appeal.

34. Narrative Statement of Transcript of Proceedings at Trial.

35. Plaintiffs' Statement of Points Intended to be Raised on Appeal.

36. Motion of Plaintiffs for Order Directing Transmittal of Original Exhibits to Court of Appeals.

37. Order Directing Transmittal of Original Exhibits to Court of Appeals.

38. Stipulation re Transmittal of Original Exhibits, after parties have completed briefs.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 4th day of March, 1950.

MILLARD P. THOMAS,
Clerk,

[Seal] By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 12495. United States Court of Appeals for the Ninth Circuit. Samuel H. Palmer and C. A. White, partners doing business as Western Fence & Wire Works, Appellants, vs. Karl H. Kaye, Matilda Kaye and Pacific Wire Works Co., a Corporation, Appellees. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed March 10, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2106

SAMUEL H. PALMER and C. A. WHITE, Partners Doing Business as WESTERN FENCE & WIRE WORKS,

Plaintiffs,

vs.

KARL H. KAYE, MATILDA KAYE and PACIFIC WIRE WORKS CO., a Corporation, Defendants.

STIPULATION

It Is Hereby Stipulated and Agreed between Little, Leader, LeSourd & Palmer, attorneys for the plaintiffs in the above-entitled action, and Catlett, Hartman, Jarvis & Williams, attorneys for the defendants, that the following Exhibits in this matter shall be certified and transmitted forthwith to the Clerk of the Court of Appeals for the Ninth Circuit, to wit: Plaintiffs' Exhibits 1, 10, 11, 12, 13, 14, and 15.

It is further stipulated that with the exception of the exhibits heretofore enumerated, the balance of the exhibits shall be held under the terms of the Stipulation between the parties, dated March 1,

1950, in this Court until the parties have completed their briefs on appeal.

Dated this 23rd day of March, 1950.

/s/ F. A. LeSOURD,
Attorney for Plaintiff.

/s/ FRED W. CATLETT,
Attorney for Defendants.

[Endorsed]: Filed D.C. March 24, 1950.

[Endorsed]: Filed C.C.A. March 28, 1950.

In the Court of Appeals of the United States
for the Ninth Circuit

No. 12495

SAMUEL H. PALMER and C. A. WHITE, Part-
ners Doing Business as WESTERN FENCE &
WIRE WORKS,

Appellants,

vs.

KARL H. KAYE, MATILDA KAYE and PA-
CIFIC WIRE WORKS CO., a Corporation,
Respondents.

APPELLANTS' STATEMENT OF POINTS
AND DESIGNATION OF RECORD

Come now the appellants by and through their attorneys, Little, Leader, LeSourd & Palmer, and as their statement of points intended to be relied

upon on appeal, adopt the statement of points intended to be raised on appeal filed by appellants as plaintiffs in the District Court, and as their designation of record on appeal, these appellants designate the entire file in the Clerk's original file on this case, including appellants' Narrative Statement of the Proceedings at the Trial, Statement of Points, and Designation of Record.

Dated this 15th day of March, 1950.

LITTLE, LEADER, LeSOURD
& PALMER,

By /s/ F. A. LeSOURD,
Attorneys for Appellants.

Receipt of Copy Acknowledged.

[Endorsed]: Filed March 16, 1950.

[Title of Court of Appeals and Cause.]

STIPULATION RE PRINTING
OF RECORD

It is hereby stipulated by and between Little, Leader, LeSourd & Palmer, attorneys for appellants herein, and Catlett, Hartman, Jarvis & Williams, attorneys for respondents herein, that the printed record in this Court should contain the following, and that the documents contained in the Clerk's file of the United States District Court for the Western District of Washington, Northern Division, which have been transmitted to this Court,

which are not hereinafter enumerated, need not be printed:

1. Complaint;
2. Amended Answer;
3. Stipulation concerning trial of the infringement issue first;
4. Plaintiffs' Proposed Findings of Fact and Conclusions of Law;
5. Findings of Fact and Conclusions of Law;
6. Decree;
7. Motion for New Trial;
8. Order Denying Motion for New Trial;
9. Court's Decision on Motion for New Trial;
10. Notice of Appeal dated December 20, 1949;
11. Order Extending Time for Filing Record on Appeal;
12. Plaintiffs' Designation of Record on Appeal;
13. Appellants' Narrative Statement of the Proceedings at the Trial, except that the portion of the Reporter's original Transcript of Proceedings of Trial commencing with line 1, p. 501, and ending with line 12, p. 538, shall be substituted for the Narrative Statement of the testimony of Samuel H. Palmer on rebuttal found on pages 175 to 188 inclusive of the appellants' Narrative Statement of the Proceedings at Trial;
14. Plaintiffs' Exhibits 1, 10, 11, 12, 13, 14, 15;
15. The following condensation of Plaintiffs' Exhibit 20:

"This agreement of partnership made and en-

tered into this 1st day of January, 1943, at Portland, Oregon, by and between Samuel H. Palmer, party of the first part, and Clifford A. White, party of the second part, both of Portland, Multnomah County, Oregon;

* * *

V.

“The initial capital of said partnership shall consist of the sum of Ten Thousand and no/100 (\$10,000.00) dollars cash as working capital; the machinery, patents and apparatus of a fixed and agreed value of ten thousand nine hundred eighteen and 46/100 (\$10,918.46) dollars which machinery and apparatus is now located upon the aforesaid premises, inventory of which is appended hereto marked “Exhibit A * * *”

* * *

(Signatures)”

EXHIBIT A

* * *

Patents

Flint Screen Patents

* * *

It is further agreed between the parties hereto that the following corrections shall be made to the Reporter's Transcript of Proceedings at Trial in printing the portion thereof to be included in the record: On page 535 of the Reporter's Transcript, line 18, the word “seaming” should be changed to

“shimming.” On line 19 the word “seamed” should be changed to “shimmed.” On line 20 the word “seams” should be changed to “shims.” On line 21, the word “seamings” should be changed to “shimmings” and on line 25 the word “seams” should be changed to “shims.”

Dated this 15th day of March, 1950.

LITTLE, LEADER, LeSOURD
& PALMER,

By /s/ F. A. LeSOURD,
Attorneys for Appellants.

CATLETT, HARTMAN,
JARVIS & WILLIAMS,

By /s/ FRED W. CATLETT,
Attorneys for Respondents.

[Endorsed]: Filed March 16, 1950.

[Title of Court of Appeals and Cause.]

MOTION FOR CONSIDERATION OF EX-
HIBITS IN ORIGINAL FORM.

Come now the appellants by and through their attorneys, Little, Leader, LeSourd & Palmer, and move the Court for an order relieving appellants from printing and reproducing all of the exhibits in this case, with the exception of Plaintiffs' Exhibits 1, 10, 11, 12, 13, 14, 15 and 20, and directing that the exhibits not printed be considered by the Court in their original form.

This motion is based on the files and records in this action and on the affidavit of F. A. LeSourd attached hereto.

Dated this 15th day of March, 1950.

LITTLE, LEADER, LeSOURD
& PALMER,
By /s/ F. A. LeSOURD,
Attorneys for Appellants.

So Ordered.

/s/ WILLIAM DENMAN,
Chief Judge.

/s/ H. T. BONE,

/s/ WALTER L. POPE,
United States Circuit Judges.

Approved this 15th day of March, 1950.

CATLETT, HARTMAN,
JARVIS & WILLIAMS,
By /s/ FRED W. CATLETT,
Attorneys for Respondents.

State of Washington,
County of King—ss.

F. A. LeSourd, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for the appellants in the above-entitled action; that Plaintiffs' Exhibits 1, 10, 11, 12, 13 and 14 were Patent Office copies of various patents and that sufficient copies have been requested from the Patent Office to sup-

ply to the Clerk for binding in the printed record herein; that Plaintiffs' Exhibit 15 is a letter which may properly be printed in the record herein, and that Plaintiffs' Exhibit 20 consists of a partnership agreement, the relevant portions of which can be summarized in the printed record herein.

That all of the other exhibits of both plaintiffs and defendants should not be printed and reproduced, but should be examined by the Court in their original form for the following reasons: They consist of wires or wire screens which cannot be reproduced; catalogs and advertisements containing drawings and illustrations which are the relevant portions of the exhibits and should be examined by the Court; the file wrapper and contents of the Patent Office containing illustrations which should be examined by the Court; photographs of screens and dies which should be examined by the Court, and invoices which should be examined in their original form.

That by order of the Honorable John C. Bowen, Judge of the District Court of the United States for the Western District of Washington, Northern Division, in the above action, the Clerk was directed to transmit the exhibits in this case in their original form to this Court; that a Stipulation has been filed in the District Court herein agreeing between counsel for appellants and counsel for respondents that the exhibits to be considered by this Court in their original form may remain in the District Court in Seattle until such time as

the parties hereto have completed their briefs in this matter, at which time they shall be forwarded to the Clerk of this Court.

Further affiant sayeth not.

/s/ F. A. LeSOURD,

Subscribed and sworn to before me this 15th day of March, 1950.

[Seal] /s/ M. E. DAVIES,

Notary Public in and for the State of Washington, Residing at Seattle.

[Endorsed]: Filed March 28, 1950.

In The United States Court of Appeals
For the Ninth Circuit

SAMUEL H. PALMER and C. A. WHITE, Partners Doing
Business as WESTERN FENCE & WIRE WORKS,
Appellants,

— vs. —

KARL H. KAYE, MATILDA KAYE and PACIFIC WIRE
WORKS Co., a Corporation,
Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

BRIEF OF APPELLANTS

F. A. LESOURD,
1510 Hoge Building, Seattle 4, Wash.

PAUL BLIVEN,
4260 W. Marginal Way, Seattle 6, Wash.
Attorneys for Appellants.

In The United States Court of Appeals
For the Ninth Circuit

SAMUEL H. PALMER and C. A. WHITE, Partners Doing
Business as WESTERN FENCE & WIRE WORKS,
Appellants,

— vs. —

KARL H. KAYE, MATILDA KAYE and PACIFIC WIRE
WORKS Co., a Corporation, *Appellees.*

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF WASHINGTON
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Attorneys for Appellants.

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In The United States Court of Appeals

For the Ninth Circuit

SAMUEL H. PALMER and C. A. WHITE,
Partners Doing Business as WESTERN
FENCE & WIRE WORKS, *Appellants*,

vs.

KARL H. KAYE, MATILDA KAYE and
PACIFIC WIRE WORKS Co., a Corpora-
tion, *Appellees*.

No. 12495

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

BRIEF OF APPELLANTS

OPINIONS BELOW

The opinion of the District Court at the conclusion of the evidence is found at R. 306-309. The opinion on the motion for new trial is found at R. 45-48.

JURISDICTION

Jurisdiction is based on the patent laws of the United States, and U.S.C., Title 28, Sec. 1338. The complaint alleges (par. 1, R. 2) that the action is brought for injunction and damages for infringement of United States Letters Patent No. 2074665. Appeal to this court is taken pursuant to U.S.C., Title 28, Sec. 1291.

QUESTIONS PRESENTED

1. Is it patentable invention to discover that a particular form of wire is desirable in an industrial wire screen, the form itself resulting in substantial advantages in use, where persons skilled in the art had known that the wire could be made in such form but had considered it undesirable and had never produced such a screen? The District Court held it was not patentable invention.

2. Is the form of wire screen mentioned in Question 1 anticipated by other screens containing different forms of wire and, consequently, having different results in use, because the same process of manufacture, with different dies or different adjustments in the same die, would produce any of these screens? The District Court held it was anticipated.

3. Did the testimony fail to raise the question, not raised by the pleadings, that in the Palmer patent the disclosure was insufficient? The District Court held that evidence introduced without objection raised the question.

4. Do the claims of a patent sufficiently point out the invention of a desirable form or shape of the wire in an industrial wire screen, where they point out the form desired in the finished screen but do not contain any exact formula for achieving this form, the testimony showing that persons skilled in the art long have been able to give the wire in a screen any desired shape? The District Court held that the claims were not sufficient.

5. Have the appellees infringed appellants' patent

where appellees have produced and sold screens containing the same form of wire as that shown in the patent, although appellees also produce screens where the wire formation may differ in varying degrees from the form shown in the patent? The District Court held there was no infringement.

STATEMENT

By complaint filed September 28, 1948, appellants brought action for injunction against and damages for infringement of United States Letters Patent No. 2074665, issued March 23, 1937, for woven wire screens. The inventor and patentee is Samuel H. Palmer, one of appellants (R. 55). Appellants are partners d/b/a Western Fence & Wire Works, Portland, Oregon. The patent is an asset of the partnership (R. 56, 345). Appellee, Pacific Wire Works Co., is a Washington corporation, with its principal office and place of business in Seattle, Washington. Appellees Karl H. Kaye and Matilda Kaye reside in the Western District of Washington, Northern Division (R. 3, 163). In 1944 the business now being conducted by Pacific Wire Works Co., a corporation, was being carried on by Pacific Wire Works, Inc., a corporation. Pacific Wire Works, Inc., was disincorporated December 31, 1944, and the business was conducted during the years 1945, 1946 and 1947 by a partnership composed of the appellees Karl H. Kaye and Matilda Kaye under the firm name and style of Pacific Wire Works Co. On December 31, 1947, that partnership was dissolved and on January 1, 1948, Pacific Wire Works Co., a corporation, acquired the business (R. 163-164).

The complaint alleged the invention and proper application for, and issuance of, the patent, notice to the appellees of said letters patent and the fact that appellees continued infringement after notice. The amended answer admitted the issuance of the patent, the fact that the appellants and the appellee Pacific Wire Works Co. each were manufacturers of woven-wire screens, that appellees Karl H. Kaye and Matilda Kaye had manufactured wire screens, that appellee Karl H. Kaye as President of Pacific Wire Works Co. had notice of appellant's patent, and denied the other allegations of the complaint. For affirmative defense, the amended answer denied invention and alleged that the letters patent are invalid and void because of lack of invention and lack of novelty, considering the prior state of the art; that the alleged invention had been in public use and on sale in this country for more than two years before his application for a patent and had been abandoned to the public; that the patent was anticipated by the Potter patent, No. 1,139,469, and the Galloway patent, No. 1,907,056, and that one Lippincott designed a similar screen and made prints dated August 31, 1933, November 28, 1933, September 29, 1933 and October 2, 1933; and that John A. Roebling Sons Company manufactured the Lippincott screens on or before the dates designated; that the arch referred to in the Palmer patent was fully known many years before the alleged Palmer invention and had been known and used or discarded by many manufacturers prior to the invention; and that among those having manufactured and sold wire screens involving the alleged

invention, in addition to John A. Roebling Sons Company, were Manganese Steel Forge Co., Abbey-Sherer Company, and Ludlow Saylor Wire Co. (R. 1-13).

It was stipulated that the question of infringement would be tried out first, the question of damages to be deferred for later trial (R. 13-14).

The patent sued upon, being Patent No. 2074665 (Pl.'s Ex. 1, R. 332), hereinafter called the "Palmer patent," relates to the art of forming woven wire screens for industrial purposes (R. 57-59, 324-325). Industrial wire screens are those used for the screening of aggregate in the mining, sand and gravel and other businesses where it is necessary to size and classify mining ore, crushed rock, concrete aggregates and other materials (R. 57, 59-60). While these are called wire screens, the material used in them is actually steel rods from $5/32$ of an inch to one inch in diameter (R. 80). These screens are usually used in vibrating frames in decks, one screen on top of another, the larger opening screens on top. The material passes through or over these screens, the top screen taking off the sizes larger and the bottom screen letting through sizes smaller than those desired (R. 60).

The vibrating frame vibrates or shakes at a rate from 800 to 3200 vibrations per minute. The screen moves according to adjustment anywhere up to $3/8$ ths of an inch. The screen is set on about a 45° pitch and the movement of most of them is up and down or end-wise, the material traveling from one end of the screen to the other (R. 61).

The average load carried by these screens is about

6000 pounds per square foot of screen area per hour. This weight in crushed rock or other material is delivered on to the screen by means of a conveyor. A good screen should run about 150 to 200 yards per hour (R. 62).

The bending and shaping of wire and rods and the weaving of these into screens is an old process. Manufacturing techniques have long existed whereby wire and rods can be bent, or "crimped" as it is called in the trade (R. 59, 86), to any form or shape desired (R. 88, 138, 146).

There is more than one manufacturing process that shape these wires as desired (R. 157, 190). The method most commonly used, and used by both parties to this case, is to pre-form each wire separately (R. 76, 140) in a press where it is bent by pressure of parts of a die which is so arranged as to produce the desired shape (R. 76, 138, 160, 175, 179, 205). If the wire is curved as it comes off the coil, it is straightened before being put in the press for pre-forming (R. 160, 176). The die in the press can be arranged so as to give the wire any desired shape (R. 146, 160). In appellee's dies, for example, there are adjustable parts on the top of the die called "pads" and adjustable parts on the bottom of the die called "shims" (R. 206). Through adjustment of these parts the degree, length and depth of all curvatures in the wire can be varied or eliminated as desired (R. 109, 206, 227-229, 241-243, 286).

Another method of pre-forming the wire is to run the wire through a gear or wheel crimper (R. 76, 160, 239, 334, 341).

When the wires have been pre-formed to the desired pre-determined shape, they are placed in a loom and are woven together into the completed screen (R. 76, 140, 160, 178).

The original industrial wire screen, which has been in use more than a hundred years, was woven the same as a piece of cloth, over and under, and was known in the prior art as a basket-weave, or double-crimp," screen (R. 59-60, 88, 131, 192). An example of this screen is plaintiff's (Exh. 8, R. 59). The double-crimp screen is exactly the same on both sides, the wire curving in one direction with the same radius as it curves in the opposite direction. In other words, there are equal and alternating indentations in opposite directions on the wire so that when woven the wires go over and under an equal distance like a piece of cloth (R. 59-60, 103-104).

The double-crimp type screen was objectionable for industrial screens (R. 192) because no matter which side was used it had sharp crimps or bends on the wearing side of the screen and under the abrasion of the material passing over it the crimps wore off and the screen went to pieces (R. 62, 121-122). Prior to about 1931, very few screens were used for classifying heavy abrasive materials with an opening of more than three-quarters of an inch because they didn't stand up. Ninety per cent of the use in classifying materials above three-quarters of an inch prior to that time was flat boiler-plate with holes punched in it (R. 59). This was likewise unsatisfactory because while it wore well, it was too smooth to force the material to pass through the openings

and too much of the material which should have dropped through the openings passed over the plate (R. 65).

Inasmuch as the wire can be bent (or "crimped") to any desired formation it is in the discovery of desirable wire formation that advances have been made in the art of industrial wire screens. The attempts at advancement have been to discover shapes and formation of the wire which would increase wearing ability and efficiency (Pl.'s Exhs. 1, 10, 11 12, 13, 14; R. 324-343); (Pl.'s Exh. 18, p. 32).

On May 11, 1915, Patent No. 1, 139, 469 was issued to W. S. Potter for a screen consisting of rods having straight portions with intervening sharp cups or "crimps" and woven with the concave portions of the crimps all facing the same direction, the crimps of one set of bars embracing the straight portions of the other set of bars, so that one surface of the screen contains the straight portions of the rods of both sets of wires all in the same plane (Pl.'s Ex. 10; R. 327-329). This gave a screen with a flat surface on one side which was used as the wearing surface in screening abrasive materials and a very rough surface on the opposite side (Pl.'s Exhs. 5 and 7 are examples of Potter type screens (R. 62. 63). In the Potter screen the rod extends in a straight plane across two openings of the screen and then drops abruptly and sharply into a cup or notch the full depth of the diameter of the rod being used (R. 327-329).

The "crimp" or "hump" (R. 328) in the Potter screen is sufficiently sharp that the concave portion or "cup" of the crimp maintains contact with dia-

metrically opposed sides of the intersecting wire, which rests in the crimp, up to the center plane of the wire (R. 89-90; Pl.'s Ex. 10, Figures 1 and 2, R. 327). In other words, the inside or concave surface of the crimp in the Potter patent has the same radius as the wire, which is half the diameter of the wire, while the outside or convex surface of the crimp in the Potter patent has a radius of one and one-half times the diameter of the wire (R. 104; Pl.'s Ex. 10, Figures 1 and 2, R. 327). This results in almost a right angle bend in the wire at each point where the straight wire ends and the cup or hump begins (R. 90; Pl.'s Ex. 10, Figures 1 and 2, R. 327).

The advantage of the Potter screen over previous screens was that, being flat on one side, it produced a greater wearing surface (R. 64, 90). The disadvantages were that the sharp bend in the wire tended to weaken or fracture the wire, particularly if spring steel wire was used (R. 65, 66, 73, 146); the screen had a tendency to distort in use by the shifting of the cross wire along the straight portion of the wire where there was no resistance to hold the cross wire in place (R. 67, 73-74, 121); and there was not sufficient roughness on the flat or wearing surface to give efficiency in classifying materials (R. 65).

Helman attempted to meet the distortion difficulty and the weakness of the wire, in his patent No. 1,678,941, issued July 31, 1928. His method was to make the old double crimp but to flatten out the crests of each curve in the wire, assertedly resulting in a better locking position and an increase in the

hardness and rigidity of the wires (Pl.'s Ex. 14, R. 341-343).

The next patent in the art was No. 1,829,498 to Boehm on October 27, 1931 (Pl.'s Ex. 12, R. 333-337). Boehm's purpose likewise was to make a screen which would maintain its shape and resist the tendency of many types of screens to become "sleazy" and to give a screen having greater life (R. 335). The Boehm screen was of the double-crimp variety, in that each side of the screen was the same as the other, but Boehm attempted to achieve a tighter screen by shortening the wire through the use of an extra bend in the wire in between the bottom of one crimp and the top of the next (R. 333).

On May 2, 1933, Patent No. 1,907,056 was issued to Galloway (Pl.'s Ex. 11, R. 330-332). Galloway's purpose likewise was to answer the problem of distortion. His formation contained a sharp crimp like Potter's (R. 158), in which every other transverse wire rested. This crimp, like Potter's, had an inside radius of half the diameter of the wire (R. 104). Galloway's screen had a smoother side and a rougher side, also like Potter's screen. However, in order to prevent shifting of the alternate transverse wires which in Potter's screen rested under a straight section of wire, Galloway made in the straight section of wire a shallow depression or "crimp," in which these alternate transverse wires could rest. This resulted in giving to that portion of the wire which was straight in Potter's screen a formation of three humps between every set of cups, the humps being on the smoother side of the screen, the one used as the wear-

ing surface. On the opposite side of the wire there resulted three depressions between each main set of humps (R. 74-75, 104-105, 158, 163, 194; Pl.'s Ex. 11, R. 330-332).

While the Galloway formation gave a tight screen which did not distort, its disadvantages were that in order to bend the wire into three crimps for every two meshes which his patent called for, it was necessary to use soft wire (R. 74) and the numerous protrusions wore off rapidly and shortened the life of the screen (R. 75, 110). A screen could not be made under the Galloway patent using high carbon wire because the abrupt crimps would have a tendency to fracture the wire (R. 76).

On August 1, 1933, Patent No. 1,920,495 was issued to Brown (Pl.'s Ex. 13, R. 338-340), dealing with a method of making woven-wire screens whereby soft wire is crimped and then hardened by heat treatment after crimping. The Brown screen was the same on both sides, the crimps being made equally in both directions.

The above-mentioned patents were all cited by the Patent Office and the Palmer claims allowed in view of these patents (Pl.'s Ex. 18, pp. 14, 23).

Up to 1932, ninety per cent of the wire used for industrial screens was a soft wire known as "bright basic, low-carbon wire" (R. 65). It was a problem in the industry how to make a screen so as to use the new spring steel high-carbon high-tensile strength wire that had been developed (R. 65, 84-85). Spring steel high carbon wire is the most desirable for use in

industrial screens because it lasts longer. It resists abrasion better (R. 66). When spring steel is used, if the crimps are too abrupt, too sharp, the wire will have a tendency to fracture in the fabricating (R. 73). A sharp, almost right-angle bend, such as is found in the Potter screen, means that the opposite side of the wire from the sharp bend must stretch and high-carbon wire won't stretch (R. 90). In order to cold-press crimps into a three-eighths inch or larger high-carbon and high-manganese content spring steel wire with a straight wire between the crimps such as is shown in the Potter patent, the manganese content cannot be too high and the steel must have proper heat treatment (R. 146). When the wire is heat-treated, it is not a spring-steel wire (R. 84). Also, heat-treatment is expensive (R. 77).

About 1929 the federal specification for gravel for highways became very rigid. They required a particular size with only a five per cent tolerance. These specifications mean that the mesh had to be almost perfect and had to be made rigid enough to prevent distortion in use (R. 66-67).

Samuel H. Palmer commenced his experience in the metal-working industry in 1907 with the Seattle Wire & Iron Works. After the end of the first World War he became foreman of the Wire Department of the Northwest Fence & Wire Works at Portland, Oregon, and worked there until 1928, at which time he was Superintendent and Assistant Manager. In 1928 the corporation was purchased by the United States Steel Corporation and merged with the Cyclone Fence Company and became a subsidiary of the American

Steel & Wire Company. Palmer remained for two years thereafter in charge of the Northwest territory for Cyclone Fence Corporation. Northwest Fence & Wire Works, between 1918 and 1928, and Cyclone Fence Company from 1928 to 1930, were the leading wire fabricators in the Pacific Northwest of industrial wire screens. Palmer was in charge of the manufacturing and was fully responsible for the design of their products. He also was responsible for the design of the tools by which those products were made (R. 56-57).

In 1931 the American Steel & Wire Company plant closed down because of the depression and Palmer set up business as the Western Fence & Wire Works in Portland and commenced development work on an industrial wire screen (R. 59) which would meet the objections to the screens then in use; namely, distortion, poor wearing quality or poor efficiency and inability to use spring steel high carbon wire, cold pressed (R. 59, 64-67).

The Palmer patent application was filed August 2, 1934, and granted March 23, 1937 (Pl.'s Ex. 1, R. 323-326). The object stated in the application was to secure a screen of superior wearing qualities and strength by using high-carbon material wherein shifting of the wires relative to each other is minimized and at the same time to distribute the wearing surface over the greater part of the screen so as to increase the length of service (R. 324).

The formation shown by Palmer was a screen with a relatively smooth side and a relatively rough side accomplished by two sets of crossed spring tension

high carbon wires, each wire being formed with cold-pressed gradual longitudinal arches bowing on the smooth side of the screen, the terminals of adjacent arches defining relatively shallow crimps, the crimps being coincident with the intersections of the adjacent arches, the sets of wires being woven so that the mid-points of the arches of one set overlies the intersections of the arches of the other set (Pl.'s Ex. 1, Claim 2, R. 325).

The basic feature of the Palmer formation is the series of interconnecting, gradual, uniformly curving arches, each arch extending over two meshes of the screen, the intersection of one arch with the next adjacent arch on the wire forming a shallow depression or crimp (R. 67-70, 95 Pl.'s Ex. 1, R. 324-326; Pl.'s Ex. 18, pp. 32-33). These arches eliminate the sharp bends in the wire found in Potter, Galloway and other screens, and make it possible to cold press spring steel high carbon wire without weakening the wire (R. 73, 76, 85). The arches are woven all on the same side of the screen, giving a wearing surface that, while not flat like Potter, is relatively smooth (R. 70). The other side of the screen contains the humps caused by the intersections of the arches and thus is quite rough (R. 70).

The Palmer screen wears much better than the Galloway and double crimp screens (R. 109-110, 122). The arches make the wearing surface slightly rougher than the straight wire of Potter and this results in more efficiency in classification (R. 110). The gradual arch prevents shifting of the transverse wire resting against the concave side of the arch because the transverse wire

rests in the deepest part of the arch and meets resistance to movement either way and this fact, together with the characteristics of the spring steel wire, gives a screen that does not distort in use (R. 68, 95, 106, 121). Plaintiff's Ex. 3 is an industrial wire screen of one and one-half inch opening manufactured by Palmer with the Palmer formation (R. 71). Pl.'s Ex. 6 is a screen of a longer mesh manufactured under the Palmer patent, which has been worn out in actual use (R. 71).

The resistance to distortion accomplished by the Palmer formation as compared to the Potter formation is demonstrated by Plaintiff's Exhibits 4 and 5. Plaintiff's Exhibit 4 is a small sample of screen made with the Palmer formation and Plaintiff's Ex. 5 is a sample of the same size screen made with the same materials in the Potter formation. Applying pressure to Plaintiff's Ex. 4, the Palmer type, by means of pliers will not make the wires shift. However, applying much less pressure with the pliers to Plaintiff's Ex. 5, the Potter type, will make the wires shift (R. 64, 71, 74-34).

The arch in the Palmer formation extends across two meshes of the screen. It must have a height when woven equal to the diameter of the wire so that the central portion or deepest part of the concave side of each arch will pass over an intersecting wire and the intersection of the terminals of adjacent arches will pass under the adjacent intersecting wires, and the entire screen will maintain a thickness of twice the diameter of the wire, keeping all of the arches on the same plane (R. 70-71, 123-125). Because of this

the exact length and radius of the arch and of the crimp formed by the intersections of the arches varies with the size of the wire and the size of the mesh (R. 103, 283, 288). The radius of the crimp varies between two-thirds and three-fourths of the diameter of the wire (R. 70, 104).

Furthermore, in pre-forming the wire, the characteristics of the particular wire being used must be considered (R. 70, 218, 284). The flexibility, springiness, of wire varies from lot to lot and even along a wire in a single spool thereof (R. 188). Thus, to achieve a particular tightness, or pressure, in a screen between crossed wires at their crossing, the wire must be sprung, or deflected, during the weaving, more or less depending upon the physical character of the particular wire. This means that while the final form in the screen is predetermined and constant for a given mesh and wire size, the pre-formed shape of a wire before weaving varies (R. 144, 187, 242-243, 284, 287-288). For this reason it is not possible to give a precise mathematical formula for pre-forming the wire for the Palmer screen (R. 284). However, in all finished screens of the same mesh and wire size, the arches will be the same in radius (R. 287-288). The factors controlling this radius in the finished screen are that there must be sufficient curve in the arch to give a height when woven equal to the diameter of the wire, so as to permit the arch to maintain a uniformly curving character to its intersection with the next arch, thus eliminating the sharp bend found in Potter and at the same time offering resistance to slipping of the transverse wire which rests against the concave por-

tion of the arch, but there must be no more curve than this because each arch must bear on the transverse wire passing beneath it and must be kept as flat as possible to add to its wearing qualities (R. 70, 94-95, 125, 274-275, 278-279, 281-283).

Palmer in 1932 commenced and with appellant White has continued to manufacture and sell the screen patented by him. Appellants have built up a substantial and lucrative business in these screens, their main outlet being the northwest territory (R. 79-80). Appellees are competitors of appellants in this territory (R. 112).

Joseph E. Lippincott of the John A. Roebling Company, Trenton, N. J., drew the originals of Def.'s Ex. A-1 in 1925, Def.'s Ex. A-2 in 1932, Def.'s Ex. A-3 in 1935 and Def.'s Ex. A-4 in 1948 (R. 140). Screens were manufactured by Roeblings in accordance with these drawings as soon as they were designed (R. 140). These screens are identical with the Potter screen, except that Roebling has now improved on the Potter design by placing a "nick" at the middle of the straight portion of the wire where it intersects a cross-wire to help prevent the wires from shifting out of place (R. 147). Lippincott testified that an arch similar to that in the Palmer patent was known to manufacturers of woven wire screens prior to August 2, 1932 (R. 142). He stated that this testimony was based on information that they had on this "natural" arch from their observation of other manufacturers' screens and from their own knowledge and experience in design of screens (R. 148). The Roeb-

ling Company is a competitor of appellants (R. 118, 138).

Ludlow-Saylor Wire Co., St. Louis, Mo., on March 28, 1931, manufactured and sold a screen of the same type shown in the Potter patent (R. 150, 153; Pl.'s Ex. 9). Duncan C. Dobson of that company testified that an arch similar to the arch shown in the Palmer patent was known to manufacturers of woven wire screens prior to August 2, 1932 (R. 152). He stated that he had not seen such an arch but that Manganese Steel Forge Co. had known of the arch in 1925 and he had learned of it through advertisements and customers (R. 154) and that the natural curvature of the wire coming from the coil was very evident (R. 115).

Manganese Steel Forge Co., Philadelphia, Pa., commencing in 1921, has manufactured hot crimped screens under the Potter and Galloway patents (R. 157-158). They do not use spring steel wire (R. 156-157).

Abbey-Scherer Co., El Monte, Calif., have since 1933 manufactured screens identical with the Potter patent except that they place an indentation or "nitch" half way between the two "humps" so that the fill wire has a definite resting place and holds the size of the opening exact (R. 159-160, 162).

Def.'s Ex. A-36, offered for the limited purpose of construing the claims of the Palmer patent (R. 249-252) is a catalogue of W. S. Tyler Company, Cleveland, Ohio, copyrighted 1927 (R. 249). It shows a number of screens of a rectangular mesh type (R.

252-255). All of these screens are exactly the same on both sides, unless one side was later rolled (R. 264). Appellant Kaye testified that one side could be rolled and not the other (R. 264).

Plaintiff's Ex. 2 is an industrial wire screen of one and one-half inch opening manufactured and sold by appellee Pacific Wire Works Co. on Sept. 21, 1949 (R. 53-54). It was invoiced as 1½" opening 3/8" wire Pacific 4S wire screen (Pl.'s Ex. 19). It is a duplicate of one manufactured and sold by appellees Karl H. Kaye and Matilda Kaye, d.b.a. Pacific Wire Works Co., in December, 1947 (R. 53-55). Pl.'s Ex. 2 has a smooth side and a rough side, the smooth side normally being used as the wearing surface in actual use (R. 122). Plaintiff's Ex. 2 comprises two sets of crossed spring steel high carbon hard drawn wires, one set being arranged at right angles to the other set (R. 84). In Pl.'s Ex. 2 each wire is formed with gradual longitudinal arches, said arches bowing on the smooth side of the screen (R. 83, 122-123). These arches are cold pressed (R. 77, 176). They are of uniform curvature (R. 128).

The curvature of the arches of Pl.'s Ex. 2 is traced in red pencil on a card introduced as Pl.'s Ex. 21. The curvature of the arches of Pl.'s Ex. 3, manufactured by Palmer in accordance with his patent in the same size as Pl.'s Ex. 2, is traced in black pencil on Pl.'s Ex. 21. The straight wire between the cups or "crimps" of Pl.'s Ex. 7, a screen built in accordance with the Potter patent, is traced on Pl.'s Ex. 21 in green pencil (R. 127-128).

Def.'s Exs. A-9 to A-19, inclusive, are ends of

wires that had been pressed by appellees for use in screens. Def.'s Exs. A-20 to A-27, inclusive, are samples of screens manufactured by appellees. These screens, and also Pl.'s Ex. 2, are sold by appellees under the name of "Pacific 4S flat top" screen (R. 83, 237-238, Pl.'s Ex. 16).

Prior to 1944 appellees predecessor, Pacific Wire Works, Inc., did not manufacture these "Pacific 4S flat top" screens but only small screens of the double crimp variety (R. 237). They bought the larger screens from appellants made under the Palmer patent and sold them to their customers, building up a substantial business in them (R. 237-238, 81- 82). In 1944 they ceased buying screens from appellants and commenced manufacturing the "Pacific 4S flat top" screens, selling them to their customers with no different description on their invoices from the description used for Palmer's screens (R. 81-82, 237-238). A large number of the "Pacific 4S flat top" screens manufactured and sold by appellees and having an arch formation likke Pl.'s Ex 2 have been seen at users' places of business in the Pacific Northwest (R. 83, 120).

On April 20, 1948, appellant Palmer orally notified appellee Kaye, president of appellee Pacific Wire Works Co., of Palmer's patent and of the fact that appellees were infringing it (R. 83).

At the conclusion of the testimony the court delivered an oral opinion in favor of appellees (R. 306-309). Appellants thereupon submitted their proposed findings of fact and conclusions of law, which

were rejected (R. 14-31). The court on Nov. 14, 1949, signed findings of fact and conclusions of law presented by appellees (R. 31-39) and entered its decree holding that the Palmer patent is invalid in respect to each and every one of its five claims; that if valid, the screens manufactured by appellees have not and do not infringe on said patent and that appellants are entitled to no relief under their complaint (R. 39-40).

On Nov. 23, 1949, appellants filed motion for new trial on the grounds (1) that in holding that the written description of the invention is not sufficient to point out the part or improvement or combination which Palmer claims as his invention and that from the patent and the evidence it would be impossible for one acquainted with the art to duplicate or avoid duplicating the Palmer screen, the court decided the case on an issue not raised by the pleadings; (2) that the court failed to give effect to the decisions of the Supreme Court requiring appellees to establish the invalidity of the patent beyond a reasonable doubt; and (3) to (12) inclusive, certain specific errors in the opinion, findings and decree (R. 41-43). This motion was denied on Dec. 5, 1949 (R. 43-44).

Notice of appeal was filed Dec. 20, 1949 (R. 48). By Order dated Dec. 23, 1949, the District Court extended to March 13, 1950 the time within which the record could be filed in this court (R. 49). Record was filed in this court March 10, 1950 (R. 313). By order of this court on motion of appellants, all exhibits are to be considered in original form except Pl's. Exs. 1, 10, 11, 12, 13, 14, 15 and 20 (R. 319-320).

SPECIFICATIONS OF ERROR

Appellants rely upon the following errors of the court below:

1) The court erred in entering its decree (R. 39) holding all claims of Patent No. 2074665 invalid, in that such decree is not supported by the evidence nor by the findings of fact and conclusions of law.

2) The court erred in entering its decree (R. 39) holding that the screens manufactured by the appellee have not infringed patent No. 2074665, in that such decree is not supported by the evidence nor by the findings of fact and conclusions of law.

3) The court erred in failing on all of the evidence and applicable law, to grant the relief prayed for by the complaint herein (R. 6-7).

4) The court erred in making its first conclusion of law (R. 38) to the effect that the claims of appellants' patent are invalid because of lack of invention, novelty, utility, definiteness and any advance on the prior art, for the reason that said conclusion is contrary to law and not supported by the evidence or findings of fact.

5) The court erred in making its second conclusion of law (R. 38) to the effect that the screens made by appellees do not infringe any of the claims of appellants' patent, for the reason that said conclusion is contrary to law and not supported by the evidence or findings of fact.

6) The court erred in making its Finding of Fact No. XIII in that the court ignores the differences be-

tween the several patented screens, including appellants' patented screen.

7) The court erred in making its Finding of Fact No. XIV in that

(a) The finding that it would be impossible for anyone, even though acquainted with the art, to duplicate with certainty the Palmer screen or avoid such duplication is not supported by any evidence, is contrary to the evidence, and is not within the issues raised by the pleadings.

(b) The finding that the screens are manufactured by a punch is contrary to the evidence, the evidence establishing that the wires for the screens are formed by dies.

(c) The finding that the wire will naturally form an arch is contrary to the evidence, the evidence establishing that the wire will take whatever shape the die is designed to give it.

(d) The finding that manufacturers of screens generally regard the arch as a disadvantage and endeavor in every way to eliminate it and that this arch was known long before appellants' patent and that the manufacturers deliberately reduced or removed it, is ambiguous and uncertain as to whether it is intended as a finding that a screen of the form shown by Palmer was ever previously made, used or published, and if it is so intended, then said finding is contrary to the evidence.

8) The court erred in making its Finding of Fact No. XV in that:

(a) The finding that the claims of appellants' pat-

ent have no novelty and represent no invention or improvement over prior art is contrary to law and to the clear weight of the evidence.

(b) The finding that the claims of appellants' patent do not represent any change or improvement which would not readily occur to a skilled mechanic familiar with screen making is contrary to the evidence.

(c) The finding that the ideas in said patent claimed to be new were either known to the prior art or anticipated by the Potter and Galloway patents and the screens manufactured and sold thereunder is contrary to law, not supported by evidence and contrary to the evidence.

(d) The finding that there is no utility in the claimed invention is contrary to law, not supported by evidence and contrary to the evidence.

(e) The finding that the claims do not contain a written description of the invention and discovery sufficient to point out particularly, and do not distinctly claim the part or improvement or combination which Palmer claims as his invention so as to inform the public of the limits of the monopoly asserted, and so that the public may know which features may be safely used or manufactured without a license and those which may not, is not supported by evidence, is contrary to the evidence, and is not within the issues raised by the pleadings.

9) The court erred in making its Finding of Fact No. XVI in that the finding that screens manufactured by appellees do not infringe upon the appellants' patent is contrary to the evidence.

10) The court erred in failing to adopt appellants' proposed Findings of Fact and Conclusions of Law.

11) The court erred in denying appellants' motion for a new trial.

ARGUMENT

I.

Basic Issue Is Whether Discovery of Desirability of New Form of Wire in an Industrial Wire Screen Is Invention.

The basic issue in this case is whether there is patentable invention in the discovery that a particular formation of wire is desirable in an industrial wire screen where the formation itself produces beneficial results in use, and where a screen of this formation had never before been used, those skilled in the art knowing that such form of wire could be produced but not making such a screen because they thought it not desirable.

That the decision for appellees below resulted fundamentally from the view of the District Court that there was no invention under these circumstances appears clearly from examination of its oral opinions. The court, in effect, held that there was no invention unless there was something new in the method of manufacture. In the court's final opinion, denying motion for new trial, it stated (R. 47):

“* * * after all is said and done about this case and all of the evidence relating to it, the basic primary principle of gravel screen wire weaving involved in plaintiff's patent has been known to

cloth weavers for generations. It is basically and primarily nothing more than the ordinary basket weave style of weaving ordinarily employed in the cloth weaving industry.

“The only way you can get in plaintiffs’ gravel screen wire net weaving process any variations of that basic primary principle of basket weaving of cloth is to introduce some discussion and consideration about the different kinds or sizes of the wires to be used in making the wire net gravel screen, instead of, if you were weaving cloth, discussing and considering the kinds or sizes of warp and woof that might be used in making the ordinary basket weave style of cloth weaving. But in such considerations, as applied to plaintiffs’ patent process, is to be disclosed no valid patent.”

If the District Court is correct in this statement, it means that most, if not all, of the patents granted in the art of industrial wire screens are invalid, because they are all woven like cloth is woven, and the new thing about most of them is merely the form (*i. e.*, the bends and curvatures) of the wire in the finished screen. It is this form itself that gives these various screens different characteristics in use (R. 323-343).

The District Court’s opinion delivered at the close of the testimony likewise dwells on the manufacture of the crimp and finds no invention on the ground that plaintiff’s arch is a by-product of the manufacture of the crimp (R. 306-307). Again it is apparent that the court is looking for some difference, something new, in the method of manufacture. The fact that Palmer was the first to discover the desirability of and to use this particular formation of wire in an industrial wire

screen was not sufficient in the eyes of the District Court.

That Palmer was the first to discover and use a screen of the form shown by him is uncontradicted by any credible evidence in this record, as we will later develop. That this form of screen produced important desirable results in use—the form being the essence of the matter—is also clearly established and will be developed. Others skilled in the art had failed to perceive the advantage of this form even though knowing that the wire could be given such form. Under these circumstances, we submit that even though no new manufacturing methods are used, there was patentable invention when Palmer discovered, reduced to practice and published for the first time the fact that this particular form of wire could be used in an industrial wire screen with marked beneficial effect. *Hobbs v. Beach*, 180 U.S. 383, 45 L. Ed. 586, 21 Sup. Ct. Rep. 409; *O. H. Jewell Filter Co. v. Jackson* (C.C. A. 8) 140 Fed. 340, 346; *Greenwald Bros. v. Enochs* (C.C.A. 3) 183 Fed. 583; *Barry v. Harpoon Castor Mfg. Co.* (C.C.A. 2) 209 Fed. 207; *Kelly v. Coe* (C.A. D.C.) 99 F.2d 435, 441; *In re Holt* (C.C.P.A.) 162 F.2d 472, 475.

II.

The Palmer Discovery Constitutes Invention in View of the Prior Art.

The court below held that the ideas of the Palmer screen were “either known to prior art or anticipated by the Potter and Galloway patents” (R. 37). We submit that the court erred in so holding and that

nothing in the prior art cited by the answer and introduced in this case showed a formation of wire such as that shown by Palmer.

The court also held that the claims of Palmer did not represent "any change or improvement which would not readily occur to a skilled mechanic familiar with screen making" (R. 37). We submit that the error of the court in so holding is demonstrated by the testimony of the manufacturers who were appellee's own witnesses who stated that they knew that the wire could be formed with an arch but thought such an arch to be undesirable (R. 145, 160).

Certainly it cannot be said that Potter or Galloway, the patents relied upon by appellees, showed the same formation of wire shown by Palmer. The essence of the Palmer screen is in each wire having arches, each arch extending over two meshes of the screen, each wire containing a series of these arches all in the same plane and bowed in the same direction, the ends of the arches abutting each other to form shallow crimps. Neither Potter nor Galloway have a uniformly curving arch over two meshes of the screen. This difference in shape produces the actual practical differences in performance of these screens in use.

Potter Screen

The wire in the Potter screen is in perfectly straight sections spaced apart by cup-like formations. Potter describes the upper surface of his screen as practically flat (R. 329, lines 1-5). The testimony is to the same effect (Palmer, R. 64, 72; Essley, R. 123; Lippincott, R. 144-145; Dobson, R. 149; Jones, R. 158; Guess, R.

163; Kaye, R. 216). Potter describes the cups in his wire as "formed by crimping the bars for their whole diameter out of line at the places of crossings of the straight portions of the intersecting bars" (R. 328, lines 106-110). This results in a straight wire between cups.

The straightness of this wire in Potter's screen permitted shifting of the intersecting wires and caused the screen to distort. This is indisputable on this record. Not only did Palmer and Essley directly so testify based on observations of Potter type screens in use (R. 73-74, 121), but all of the patents issued during the period between the Potter and the Palmer patent speak of this problem of distortion as the number one problem to be solved. See, for example, the statements in the Galloway patent (R. 331, lines 25-31).

Helman in 1928 (Pl's. Ex. 14, R. 341-343), Boehm in 1931 (Pl's. Ex. 12, R. 333-337), Galloway in 1933 (Pl's. Ex. 11, R. 330-332) and Brown in 1933 (Pl's. Ex. 13, R. 338-340) speak of the problem of distortion and all had as their major objective a screen that would hold its shape under the terrific punishment it received. Specifications for gravel were becoming rigid and screens that let through wrong sizes could not be successful (R. 66-67).

In fact it appears that the Potter screen did not enjoy any widespread use until it was modified to meet this problem of distortion. John A. Roebling Co. and Abbey-Scherer Co. each devised a nick in the center of the straight portion of the Potter wire to keep the intersecting wire in place (R. 147, 159, 211, 231, 236, 239). With this improvement Abbey-Scherer Co. com-

menced manufacturing the Potter screen in 1933, and Frank M. Guess of that company knew of no others manufacturing the screen at that time (R. 159). While Roeblings made some screens of the Potter type as early as 1925 (R. 140) they did not put the Potter screen actively on the market until 1947 (R. 305). Only the Manganese Steel Forge Co. was using the Potter screen to any extent prior to 1932 and they did so by hot crimping the wires (R. 157).

Appellant Kaye testified that his screens did not distort (R. 203). His screens, however, are the ones in dispute, it being appellant's contention that they are made with the Palmer form. Kaye admitted that his screens were not the same as Potter's (R. 236, 244, 216-217).

Kaye himself testified that some manufacturers have placed a nick in the Potter screen to prevent shifting (R. 236-237).

The gradual arch of Palmer prevented the shifting and distortion that the straight wire of Potter permitted (R. 95, 106, 121), as demonstrated at the trial with Plaintiff's Exhibits 4 and 5 (R. 64, 71, 73-74). Thus the difference in the form of the wire in the two screens was itself the factor that brought the desirable result.

Galloway Screen

The Galloway screen has the same sharp, deep crimp as the Potter screen, which would give Galloway the same formation as Potter, *viz.*: a straight wire across two screen openings, except that an additional crimp is put in that portion of the wire which is straight in

the Potter screen. Not only is the Galloway formation different from Palmer's, but the principles adopted are different. Galloway relies on the extra sharp crimp to keep the screen from shifting between the main crimps whereas Palmer relies on the long sloping arch and the ability in his formation to use cold pressed spring-steel wire. The extra humps of Galloway wear rapidly and their formation necessitates the use of soft wire. As to the difference between the Galloway and the Palmer screen, see the testimony of Palmer (R. 74-76); Jones (R. 158); Guess (R. 161); Kaye (R. 191-196). Again, as in the comparison between Potter and Palmer, the difference in the shape of the wire itself produces the desirable result or improvement, which as between Galloway and Palmer was better wearing quality, ease of formation and greater strength for Palmer.

We submit, then, that the Palmer discovery was not anticipated by Potter or Galloway, since Palmer shows a different formation of wire which in and of itself produces different results.

No Previous Screen Like Palmer's

Nor is there in the record any credible evidence that a screen with a formation like Palmer's was ever conceived or built. Lippincott's screens (Def's. Ex. A-1 to A-4, incl.) were all Potter type formations showing no arch (R. 147). One Roebling screen (Def's. Ex. A-5) does have an arch but there is no testimony to show it was produced prior to August, 1932. In fact, in referring to Exhibit A-5, Lippincott uses the present tense, showing the screen is of

recent production (R. 144). Essley confirms this by his testimony that no screen such as Exhibit A-5 was sold by Roebling or appeared in a Roebling catalogue up to 1945 (R. 304). Lippincott testified that the arch was "known to the manufacturers of woven wire screen prior to the dates of my prints" (R.141). He further testified that the information on which he based this statement was "that the information that we had on this 'natural' arch was from our observation of some other manufacturer's screens and from our knowledge and experience in the design of this and other types of screens and the dies for making same" (R. 148).

If Lippincott had known of the production or design of any screen with Palmer type arches, he certainly would have so stated. His testimony does not show any anticipation of the Palmer discovery. Even if he had conceived of a screen with this arch, that would not have constituted anticipation. There must have been built and successfully used a screen involving the elements of the Palmer invention to constitute anticipation. *Wilson v. Sherts* (C.C.P.A.) 81 F.(2d) 755, 760; *Westinghouse Machine Co. v. General Electric Co.* (C.C.A. 2) 207 Fed. 75.

While Lippincott's testimony does not establish anticipation, it does establish that Lippincott, an expert in the field, knew prior to 1932, that an arch could be produced in the wire but that he thought it was not desirable and designed his dies to avoid the arch. One could have no clearer evidence than this that more than mechanical skill was involved in Palmer's discovery. *Webster Loom Co. v. Higgins*, 105 U.S. 580,

26 L. Ed. 1177; *Miehle Printing Press & M. Co. v. Whitlock P. P. & M. Co.* (C.C.A. 2) 223 Fed. 647, 650.

Dobson likewise testified that an arch similar to Palmer's was known to manufacturers of woven wire screens prior to Aug. 2, 1932 (R. 152). When he was asked where he got such information, he stated that the manufacturer that knew of it was Manganese Steel Forge Co. (R. 154). Appellees took the deposition of Jones who had been president or vice-president of Manganese Steel Forge Co. since 1921 and he testified to no such arch, stating that their screens were Potter and Galloway screens (R. 156-158). It is, therefore, apparent that Dobson's recollection of the Manganese Steel Forge Co.'s screens was erroneous, if Dobson meant to imply that those screens had an arch like Palmer's. Moreover, it is apparent from the further testimony of Dobson on cross examination that in his testimony he failed completely to distinguish between the Potter and the Palmer screens, because after having testified that the screen his company made on March 28, 1931, was a Potter screen, one side of the screen being flat (which can be seen from the exhibit of this screen, Pl.'s Ex. 9), he completes his cross examination by citing this same screen as the basis of his knowledge of the Palmer arch, at the same time again stating that one side of the screen was flat (R. 149-150, 155-156).

The most that can be said of Dobson's testimony is likewise, then, that he knew prior to 1932 that the wire could be arched and yet failed to build any screen embodying it. Again we say that when the manufac-

turers in the industry, knowing that the wire could be formed with this arch, failed to perceive its advantage in an industrial wire screen, it cannot be said that only mechanical skill was necessary to discover that it was desirable when incorporated in a screen. The situation is the same as that in *Krementz v. Cottle Co.*, 148 U.S. 556, 13 Sup. Ct. 719, 37 L. Ed. 558, summarized in *Barry v. Harpoon Castor Mfg. Co.* (C.C.A. 2) 209 Fed. 207 (p. 209) as follows:

"In *Krementz v. Cottle Co.*, 148 U.S. 556, 13 Sup. Ct. 719, 37 L. Ed. 558, the court sustained a patent for a collar button for the reason that the skilled mechanic with his attention specially drawn to the subject, had failed to see what *Krementz* afterwards saw, that a button might be made of one continuous sheet of metal, of an improved shape, of increased strength, requiring less material and entirely dispensing with solder."

Appellees also introduced pictures of a window screen or grille on one of the windows of the Olympic Hotel in Seattle (Def.'s Exhs. A-7 and A-8) which was never used as an industrial screen for classifying substances (R. 175). Moreover, it was the old double crimp, the same on both sides (R. 226). Appellees also offered Defendant's Exhibit A-36, a catalogue of W. S. Tyler Company, for the purpose only of construing the claims of appellant's patent, since Tyler's screens were not referred to in the answer (R. 249-252). However, this catalogue shows no screen such as Palmer's. The screens there shown are all varieties of the old double-crimp, the same on one side as the other (R. 264).

It is well settled that the grant of a patent affords *prima facie* presumption of its validity. *Mumm v. Decker and Sons*, 301 U.S. 168, 171, 81 L. Ed. 983; *Seymour v. Osborne*, 11 Wall. (78 U.S.) 516, 538, 20 L. Ed. 33; *Coffin v. Ogden*, 18 Wall. (85 U.S.) 120, 21 L. Ed. 821. If it ever is to be applied, this principle has application here. This is particularly true where the only actual prior art introduced, as in the present case, consists of previous patents, all of which were cited by the Patent Office during the prosecution of the patent application and the patent was granted to Palmer in view of these citations. *J. A. Mohr & Son v. Alliance Securities Co.* (C.C.A. 9) 14 F.(2d) 799, 800; *Bianchi v. Barili* (C.C.A. 9) 168 F.(2d) 793, 796. Cf. cases cited in 35 U.S.C.A. 31, note 671.

Confusion of Terminology

We believe that the essentials of this case were obscured in the District Court by terminology used by appellees. Throughout the case they indiscriminately used the term "flat-top" to refer to a number of screens of varied form, such as Potter, Galloway and Palmer. When the task of the court is to analyze the similarities and differences between these screens, this task is not made easier or clearer by questions and argument in which the differences existing between the screens is ignored and glossed over by use of such a blanket name. Actually the term "flat-top" is a registered trade mark which designates only the screens manufactured by Abbey-Scherer Co. of the Potter type (R. 159). Yet appellee Kaye in his testimony constantly used the term "flat-top" as applying to the

Potter and to the Palmer screen so as to minimize the differences between them. The same use of the term was made in asking questions of Lippincott, Dobson, Jones, and Guess on written deposition, certainly with some confusion as shown by Dobson's replies on cross-examination. More important still, this confusion reached the District Court and even its Findings speak in several places of "flat-top type, generally speaking" (Findings, Pars. VII, IX X, XIII, R. 34, 35, 36). Blanket phrases such as this do not lend themselves to careful determination of points of similarity and differences between patented articles having different characteristics.

Further confusion was introduced by appellee Kaye in his use of the word "crimp." "Crimp" is a general word that can describe any bend in a wire, and in each of the Potter and Palmer patents the word "crimp" is used to describe a particular formation peculiar to that patent. In the Potter patent the word "crimp" is used to describe a deep cup, dropping the full diameter of the wire. The Potter crimp is in the form of a cup with its inside having a bottom concave towards the smooth side of the screen and lips convex toward the smooth side of the screen, the lips leading to the straight portions between cups. This Potter crimp is concave upwardly toward the smooth side of the screen for a depth of half the diameter of the wire and it maintains contact with the intersecting wire up to its mid-point. Thus in the Potter patent the word "crimp" refers both to a portion which is concave and to a portion which is convex towards the smooth side of the screen, all of which constitutes

the cup and the form of this cup is determined by the fact that the concave bottom has the same radius as the wire itself and maintains contact with the intersecting wire up to the mid-point of that intersecting wire. In the Palmer patent the word "crimp" is used to describe only a portion that is concave upwardly toward the smooth side of the screen and is very short and shallow consisting merely of the intersection of two arches and maintaining contact with the intersecting wire only along its bottom, the radius of this concave crimp in the Palmer screen being two-thirds to three-fourths of the diameter of the wire.

In arguing that his screens had no arches similar to Palmer, even though appearance and tracing showed the formation to be the same, Kaye applied the word "crimp" not only to the concave upward portion of the wire but also the arched portion of the wire which is convex upwardly toward the smoother side of the screen (R. 216-218, 221, 232-233). Thus he was using the word "crimp" in a sense different than that in which it was used in the Palmer patent and he thereby attempted to persuade the court that his "crimps" extended a long way out across the arched part of the wire, leaving only a small portion of the wire in the center joining his two crimps, and this small center portion he claimed was flat (R. 220, 232-233). This confusion was coupled with Kaye's testimony concerning the percentage determinations he used in adjusting the parts of his die, in such a way as to make it appear that most, if not all, of the formation of wire between the top of one arch and the top of the next arch in Plaintiff's Exhibit 2 (the

screen made by appellees which appellants contend infringes) was simply a crimp like the Potter crimp (R. 217-220, 232-233), yet at the same time he admitted that his crimp was different from Potter's (R. 236, 244).

To avoid such confusion and to decide this case on its facts and its merits, this court will, we are confident, be certain that it is comparing like with like, and is not letting use of language blind it to the very fundamental difference between the Potter straight wire and cup formation and the Palmer intersecting arch formation.

Similar confusion resulted from continued reference in questions and argument to "natural" arches resulting from the coils the wires came in and "natural" arches resulting from crimping, even though appellee Kaye himself admitted that the arch or curvature caused by the coil is removed and the wire is straightened before being shaped (R. 176, Cf. Guess, R. 160); and all the testimony indicates that the process of bending the wire will or will not produce an arch in it, or any other shape for that matter, depending on how the dies are adjusted (R. 109, 146, 160, 176, 229).

We submit that when the confusion is eliminated and the screen shown by Palmer is compared with the prior art, both as to its form and as to the practical results flowing from that form, it is clear that the Palmer discovery was not anticipated and constitutes invention.

Desirability of Palmer Screen

While the depositions taken by appellees (all of whom as manufacturers in this field had a direct interest in upsetting Palmer's patent) contain some challenge in generalities to the desirability of the Palmer screen, nevertheless, we believe that there can be little doubt in this case as to the advantages and desirability of the Palmer screen. The Palmer screen is desirable and constitutes invention in view of the prior art because there is less stress in the shaping and weaving of the wire than in Potter, Galloway, and other prior art; the wires are locked in place and will not shift as in Potter; the arch form of the wire gives faster classification of gravel than in Potter; and, while the center of the Palmer arch may wear a little faster than in Potter, the arch form and the heavier ends of arches act like the heavy ends of a bridge truss to support the lighter worn center part, as is shown by Plaintiff's Exhibit 6.

The fact of this desirability of the Palmer formation is established by its commercial success (R. 79-80, 199). Based on examination of hundreds of these screens in actual use, Palmer and Essley testified to the fact that it holds its meshes to a very close tolerance (R. 68, 121). Appellee's expert Lippincott testified that Palmer's screen was an improvement in that the crimping is less severe on the wire (R. 144-145). In fact it appears from Defendant's Exhibit A-5 that Roebling is now making screens with the Palmer formation (R. 144). Further, the principal answer to any contention by appellees that the Palmer formation is not desirable is that appellees are making it

(See Pl.'s Ex. 2) and apparently desire to continue. Appellee Kaye testified at great length to the success he was having with these screens (R. 259-260). We may here aptly paraphrase the statement in *Barry v. Harpoon Castor Mfg. Co.* (C.C.A. 2) 209 Fed. 207, 208:

“This device (Potter and Galloway screens) was never commercially successful and if, as the defendant contends, it be equally serviceable as that of the patent in suit the question at once arises, why does not the defendant use it? The fact that the defendant persists in using the Al-ley device (Palmer screen), and is willing to take the very serious risk of being adjudged an infringer, is persuasive testimony of the advantage of the ‘Domes of Silence’ (Palmer screen) over the Thonet big headed nails (Potter and Galloway screens).” (Insertions supplied)

Appellees had the burden of proving lack of invention by clear evidence establishing invalidity beyond a reasonable doubt. *Clark v. George Lawrence Co.* (C.C. Ore. 1908) 160 Fed. 512, citing at p. 514 *Coffin v. Ogden*, 18 Wall (85 U.S. 120, 124, 21 L. Ed. 821. Cf. cases cited in 35 U.S.C.A. 31, note 411. Appellees, also, had the burden of proving anticipation beyond a reasonable doubt by clear and satisfactory evidence. *J. A. Mohr & Son v. Alliance Securities Co.* (C.C.A. 9) 14 F.(2d) 799, 800. *Washburn & Moen Mfg. Co. v. Beat 'Em All Barbed Wire Co.*, 143 U.S. 275, 36 L. Ed. 154, 12 S. Ct. 443; Cf. cases cited in 35 U.S.C.A. 31 note 677. Not only did they fail to maintain this burden but also the record affirmatively supports the conclusion that Palmer's discovery constitutes in-

vention. He was the first to make and disclose the "arch" form of wire in an industrial wire screen, the form itself producing beneficial results. Under the cases heretofore cited, we submit that the court erred in holding that there was lack of invention or anticipation by prior art under these circumstances.

III.

The Palmer Patent Sufficiently Describes and Particularly Points Out the Invention.

The District Court's finding of fact XIV (R. 36) states that from the claims of the Palmer patent it would be impossible for anyone, even though acquainted with the art, to duplicate with certainty the Palmer screen or avoid such duplication. This finding is based on the remarks of the court in the oral opinion at the close of evidence that there is no certain formula for the *making* of plaintiff's screen and that it is not possible for a stranger to know with certainty how to *produce* the Palmer crimps and arches (R. 307).

Evidently the view of the District Court was, as already stated in this brief, not that the patent failed adequately to describe and point out the form of screen invented by Palmer, but that there was a failure to show any explicit formula to use in shaping the wires to go into the screen so as to achieve the Palmer formation. If that is a correct analysis of the decision below, then the answer to it is that no such explicit formula for making the Palmer formation was possible, nor was it needed.

Both the description (R. 325, left col. lines 15-16) and the claims (Claim 2, 3 and 5, R. 325-326) of the

Palmer patent state that the formation shown is to be produced by cold pressing and weaving. It is uncontroverted here that cold pressing and weaving of wire or rods into screens was an old art, well known throughout the industry, and could be used to produce any desired shape (R. 88, 138, 146, 226). What is old in the art is presumptively known and need not be described. As the Supreme Court stated in *Carnegie Steel Co. v. Cambria Iron Co.*, 185 U.S. 403, 437, 22 Sup. Ct. 698:

“He may assume that what was already known in the art of manufacturing steel was known to them, and, as observed by Mr. Justice Bradley in *Webster Loom Co. v. Higgins*, 105 U.S. 580, 586, ‘He may begin at the point where his invention begins and describe what he has made that is new, and what it replaces of the old. That which is common and well known is as if it were written out in the patent and delineated in the drawings’.”

The industry already knowing how to produce a screen of a particular form, once it was described, there was no need for the patent to give a detailed statement on the method of making it. The record amply demonstrates that persons skilled in the art knew well how to produce the Palmer formation once it had been disclosed. Appellees are making these screens (Pl.’s Ex. 2) and appellee Kaye testified at length as to how it was done. Not a single witness exhibited any doubt as to just exactly what the Palmer formation was and how it could be produced. Lippincott showed such complete familiarity with the Palmer formation both as to how it was made and as to what

it was, that he was able to state wherein he felt that the Palmer construction was and was not an improvement (R. 144-145) and his opinion of how it would wear as compared to a Potter screen (R. 145). In fact, both Lippincott and Dobson stated, not that they were unable to tell what the Palmer formation was or how to make it, but that they already knew how to make an arch such as shown by Palmer (R. 141, 152).

We submit, then, that the validity of the Palmer patent cannot be attacked on the ground that it failed to describe in detail the process of producing the form of screen shown. The District Court in demanding a mathematical formula for the making of the Palmer screen failed to appreciate the testimony of both sides that no such formula could be given because the method of achieving the particular curve in the wire which was desired varied with the size of the wire, the mesh of the screen and the characteristics of the wire itself. To get the particular arch formation disclosed by Palmer in any particular screen it was necessary to use almost a trial and error method in setting the die for a particular lot of wire. Palmer pointed out that the mechanic who sets up the machine has to set it according to his own judgment for each screen he makes. Once he finds his right crimp, he runs out a few wires and weaves them by hand to test them. When he finds he has the machine set correctly he locks his machine in position and runs out all the wires (R. 78).

Kaye confirms this same method (R. 242) as does his employee, Evans (R. 228). Due to the variation

in the wire this experimental method must be used to produce the shape desired (R. 188, 204, 218).

Tightness, or pressure, between warp and weft wires at their crossing points is achieved by springing the wires during weaving. Such springing means that the height of the arch of a wire after being woven into a screen is not the same as before it is woven. The form of the wire in the final screen is pre-determined. Part of the height of the arch will result from weaving and the amount of springing of the wires in weaving will depend on the characteristics of the wire and the mesh and wire size. Consequently, in pre-forming the wire to achieve the desired form in the final screen, it is necessary to vary the pre-formed shape of the arch and crimp in accordance with the wire characteristics and size of wire and mesh so as to allow for this springing (R. 144, 187, 242-243, 284, 287-288).

Although adjustments must be made for each particular lot of wire and for each different wire and mesh size, the mechanics can by those adjustments achieve in the finished screen whatever wire formation is desired by them, as heretofore stated. It is evident that this trial and error method of formation applies to all the screens in the art. We believe that the fact that no precise mathematical formula was given for the pre-weaving shape of the wire led the District Court into the error of believing that persons skilled in the art could not produce the Palmer screen, which is refuted on this record.

If the decision below were to be interpreted as holding that the Palmer patent does not sufficiently describe and particularly point out the invention, as

distinguished from the method of producing it which we have just discussed, then the decision likewise would be clearly in error.

The Palmer patent claims are set forth in Exhibit 1 (R. 325-326). The District Court in its oral decision and in the Findings of Fact has not considered any of the claims in detail. No need is seen for analyzing each claim in detail as a consideration of claims 2 and 3 would seem to be representative and sufficient.

Discussion of Claim 2

The introductory clause is "A screen of the character described." This clause refers to the descriptive matter in the specifications which set forth at several places the subject matter and the purposes for which the screen is to be used. The first paragraph of page 1 of the specifications is in point. The screen is described as having "a relatively smooth side and a relatively rough side." These are words of degree. One side is compared with the other. The precise manner in which this smoothness and roughness is obtained and the degree of such comparison results from the further limitations in the claim.

The next limitation is "said screen comprising two sets of crossed spring tension high carbon wires, one set being arranged at right angles to the other set." This clause states the kind of wire to be used, that the wires are in two sets which cross each other. The claim goes on to state how the wires are formed, by saying:

"each wire being formed with cold-pressed gradual longitudinal arches, said arches bowing on

the smooth side of the screen, the terminals of adjacent arches defining relatively shallow crimps on the opposite or relatively rough side of the screen, said crimps thereby being coincident with the intersections of adjacent arches.”

This limitation distinguishes the screen from any in the prior art by stating that the individual wires are formed by cold pressing. This is very desirable from the manufacturing point of view as the screen is much less expensive to manufacture than one which requires that the wires be formed while hot (R. 77). This limitation, also, states that each wire is formed in the same manner. That is, the cold pressing, the arches, and the crimps are the same for all wires of both sets. The convex side of the arches form the smooth side and the convex side of the crimps form the rough side of the screen. This is a limitation upon the manner in which the wires are woven together to form the finished product. The crimps are formed by the terminals of the arches. This states the form of the crimp. It is the intersection of two arches.

The claim goes on to state how the wires are put together to form a screen, by saying,

“said sets of wires being woven with the wires of each set alternately overlying and underlying the wires of the other set, and the midpoints of the arches in each set overlying the intersections of the arches in the other set.”

This states that each wire of one set goes over, then under, then over, then under, and so on, with respect to the wires of the other set. It also states that the crown, or midpoint, of each arch overlies a crimp.

It will be noted that the intersecting of adjacent arches is emphasized in this claim. The intersecting abutment of the ends of adjacent arches form the crimps in which the cross wires lie. Along any one wire in a screen, the crimps are spaced apart the distance of twice the mesh size of the screen. See Fig. 2, Palmer patent (R. 323). Therefore, the length of each arch is twice the mesh size. Taking either the top or bottom edge, or the center line of a wire, an arch will rise from its low point in a crimp to the crest of the arch a distance equal to the diameter of the wire. If the height of the arch is more than the diameter of a wire there will not be contact between the crossed wires. The height of the arch cannot be less than a wire diameter without removing metal from the wires at their points of crossing as the thickness of a screen is twice the diameter of a wire.

This sets the form of the screen and also the height and length of the arch for any given wire diameter and screen mesh. A complete and operative device has been set forth. There is definiteness as to the form and relationship of all the parts of the screen. There is coaction between all of the parts. The claim points out the invention with great particularity.

Discussion of Claim 3

The first phrase of this claim calls for "A woven screen formed exclusively of cold pressed high carbon wire that is formed by cold pressing of the wire. The second clause of the claim states that the warp and weft wires are the same gauge, have the same diameter. The claim goes on to state that:

“each warp wire and each weft wire being formed with longitudinal gradual arches bowed on one side of the screen only with adjacent arches defining intersections, shallow crimps on the opposite side of said screen, said shallow crimps being defined by said intersections * * *.”

As in Claim 2, this limitation states that the crimps are formed by the intersection of the arches, and that the convex side of the arches form the smooth side and the convex side of the crimps form the rough side of the screen. The claim then states that the wires are woven so that the arches rest in the concave side of the crimps. Thus the structure is complete.

It is not deemed necessary to consider the scope of claims 1, 4 and 5 for a determination of the issues here involved.

Description Is Complete

The description in the Palmer patent shows the same formation pointed out in the claims and sets forth the advantages of this screen over the prior art. Particular attention is called to the drawings, which are an integral part of the disclosure of an application and are to be used with the written part of the specifications and relied upon in obtaining comprehension of the invention of a patent. *Bickell v. Smith-Hamburg-Scott Welding Co.* (C.C.A. 2) 53 F.2d 356, 358, cert. den. 285 U.S. 541; *Wagenhorst v. Hydraulic Steel Co.* (C.C.A. 6) 27 F.2d 27, 31.

Note that in Figure 2 of the drawings of the Palmer patent the arch, reference numeral 8, is curved

throughout its length and that the radius of curvature is constant throughout the length of the arch. Note that along the wire the end of one arch abuts the end of the next arch. The juncture of the two adjacent arches forms a crimp in which a cross wire 7 rests. This is the disclosure of the drawings and the drawings give precise meaning to the wording of the specifications and claims as no amount of wording and phrasing could do.

While, as above discussed, no exact formula is possible for the method of manufacture of these screens, the form of the wire in the screen itself as shown in this patent is exact for any size of wire and mesh, as Palmer testified (R. 288). The Palmer disclosure calls for the warp and weft wires to be of the same diameter (gauge) and for the arches and crimps in both sets of wires to be the same (R. 325, first paragraph). Further, the patent states that the joints between the wires, the point where an arch lies in a crimp of a transverse wire, are tight. With this construction, the thickness of the screen from the top, or smooth face, to the bottom, or rough face, can only be twice the diameter of a wire, as the warp and weft wires are of the same diameter. This may readily be seen by reference to Figure 2 of the drawing in the Palmer patent. The diameter of the wire used, such as the wire 7, Figure 2, fixes the rise, or heighth of the arch in the wire 8. Figure 2 shows this by the arch 8 extending from its crown to each side until it contacts and passes under the transverse wires 7 at each side. The claims point out this formation by stating that the crimps are formed or defined by the terminals or intersections of

adjacent arches. The length of the arch is determined by the spacing of the transverse wires. The mesh of a screen is the distance from center to center of adjacent parallel wires. It is the opening plus one wire diameter. Thus, the length of an arch in the wire is twice the mesh. This gives, for a particular screen, the height and length of the arch, and from these two dimensions a simple mathematical calculation finds the radius of the arch.

With regard to the attempt by appellee Kaye to confuse the Palmer crimp with the Potter crimp, may we point out that the limitation of the Palmer crimp as constituting simply the intersection of two arches, clearly distinguishes it from the Potter crimp which his patent states to be of a depth sufficient to accommodate the full diameter of intersecting bars and formed by crimping the bars for their whole diameter out of line at the places of crossing of the straight portions of the intersecting bar (R. 238).

Adequacy of Disclosure Not Properly Before the Court

We submit, then, that the Palmer patent sufficiently describes and particularly points out the invention. While we have argued this point so that this Court may appreciate the strength of our position, we do not believe that the point was properly before the District Court.

The patent law (U.S.C. Tit. 35, sec. 33) makes it a condition precedent to a valid patent that an adequate disclosure be made. Rule 9c of the Federal Rules of Civil Procedure requires that a denial of performance or occurrence of conditions precedent shall be

pleaded specifically and with particularity. This is in accord with settled law in patent infringement suits that if defendant wishes to challenge the adequacy of the disclosure, he must raise that question in the answer. *Providence Rubber Co. v. Charles Goodyear*, 76 U.S. 566, 19 L. Ed. 788.

The amended answer in this case raised no such issue, and appellants were unaware that it was a contention in the case until the District Court's judgment. The District Court denied appellant's motion for new trial, raising this point, on the ground of failure to object to evidence. Yet appellant knows of no evidence which it could properly have objected to on this basis because it all was pertinent to the issues of infringement and prior art which were being tried. If evidence is competent and material on issues being tried, it will not be deemed to put parties on notice that another issue is being brought into the case. *Simms v. Andrews* (C.C.A. 10) 118 F.2d 803. Moreover, even if failure to object to such testimony were to be regarded as justifying a motion to make the pleadings conform to the proof, no such motion was made in this case.

Utility

In connection with the challenge to the disclosure, the District Court in its Findings of Fact, Section XV, (R. 37, line 23) found "that there is no utility in the claimed invention."

Screens built in accordance with the disclosure of the Palmer patent were constructed and used for the classification of gravel (R. 60). Large numbers of

these screens have been manufactured and sold (R. 81, 100).

Both appellant and appellee have sold large numbers of these screens. As used in the field of patent law, "Utility" does not question whether or not the device operated better or worse than the prior art devices. The only question raised by a plea of lack of utility is, does the device operate in the manner set forth in the patent. As the Supreme Court stated in *Seymour v. Osborne*, 78 U.S. 516, 548-549, 20 L. Ed. 33, 20 Sup. Ct. Rep. 40:

"Improvements for which a patent may be granted must be * * * useful, within the meaning of the rule of law, * * * the requirement * * * is satisfied if * * * the machine is capable of being beneficially used for the purpose for which it was designed, as the law does not require that it should be of such general utility as to supersede all other inventions in practice to accomplish the same object."

This court has held that commercial success proves utility. *Sherman-Clay & Co. v. Searchlight Horn Co.* (C.C.A. 9) 214 Fed. 86.

IV.

Appellees Have Infringed the Palmer Patent

Plaintiff's Exhibit 2 is an industrial wire screen manufactured and sold by appellee Pacific Wire Works Co. in September, 1949, and is a duplicate of one manufactured and sold by appellees Karl H. Kaye and Matilda Kaye in December, 1947 (R. 53-55). We ask the court to examine this screen in the light of the formation shown in the Palmer patent. The screen is

identical with the Palmer formation in every respect.

Plaintiff's Exhibit 2 is cold pressed from high carbon spring steel wire (R. 77, 84, 176, 236). It is comprised of two sets of crossed wires, each wire being formed with gradual, longitudinal arches bowing on the smooth side of the screen (R. 83, 122-123). These arches are of uniform curvature (R. 128). Each of the arches extends all the way across two meshes of the screen, with the "crimp" or portion which is concave upwardly toward the smooth side of the screen, consisting of the intersection of two adjacent arches.

For the purpose of comparison, appellants introduced Plaintiff's Exhibit 3 which is a screen built by Palmer in accordance with his patent and of the same wire and mesh size as Plaintiff's Exhibit 2. Examination of these two screens will demonstrate their similarity.

To show the distinction between the arch formation of the Palmer screen and the flat formation of the Potter screen, appellants introduced Plaintiff's Exhibit 21, a card on which the profile of the wire of Plaintiff's Exhibit 2 is traced in red pencil, the profile of the wire in Plaintiff's Exhibit 3 is traced in black pencil and the profile of the wire in Plaintiff's Exhibit 7, the Potter screen, is traced in green pencil (R. 127-128). Examination of Plaintiff's Exhibit 21 will likewise show that Plaintiff's Exhibit 2 is a Palmer formation and not a Potter formation.

We believe there can be no doubt that Plaintiff's Exhibit 2 is an infringement of the Palmer patent. Appellants are entitled to relief here on the basis of this infringement even though, as appellees contend,

appellees may make other screens which do not infringe appellant's patent.

Appellees' contention in this regard was that as the mesh grew longer the center of the arch flattened out. We point out that the practical effect of the arch as a locking device depends on the curvature on the bottom, or concave side, of the arch. As shown by Plaintiff's Exhibit 6, the longer mesh screens under appellant's patent do have a continuous arch and maintain that curve on the concave side even when practically worn out on the surface.

Appellees introduced mostly wires rather than screens and many of these wires were not fully formed (R. 93, 94, 269). Nevertheless, appellants in no way contend here that all screens produced by appellees necessarily infringe appellants' patent. Appellants contend that Plaintiff's Exhibit 2 certainly does infringe, and any other screens having the same form as shown in Palmer's patent likewise infringe. Determination of other screens that infringe should be the task of the Master in fixing damages.

To constitute infringement it is not necessary to demonstrate substantial identity between machines to a mathematical certainty, but "infringement" connotes correspondence as to the substantial dominant and essential elements. *Bianchi v. Barili* (C.C.A. 9) 168 F.2d 793. These elements in the Palmer patent are the arch which gives support to the transverse wire and the shallow crimp which consists merely of the intersection of two adjacent arches and thus avoids any sharp bending of the wire. We ask that the

Master be instructed that any screen containing these two elements is an infringement of the Palmer patent.

Appellants also ask that appellees be enjoined from manufacturing, using, or selling woven wire screens in which the wires are of high carbon spring steel formed by cold pressing so that each wire consists of a series of arches; the terminals of adjacent arches forming shallow crimps, and when the wires are woven into a screen, all the arches are convex with respect to one side of such screen and the center of each arch rests in a shallow crimp of a transverse wire.

CONCLUSION

We submit that the Palmer patent is valid and has been infringed by appellees, and that the decision below should be reversed with instructions to grant an injunction against appellees as prayed and to continue the case for further proceedings appropriate to the determination of damages.

Respectfully submitted,

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Attorneys for Appellants.

In The United States Court of Appeals
For the Ninth Circuit

SAMUEL H. PALMER and C. A. WHITE, Partners Doing
Business as WESTERN FENCE & WIRE WORKS,
Appellants,

— vs. —

KARL H. KAYE, MATILDA KAYE and PACIFIC WIRE
WORKS Co., a Corporation, *Appellees.*

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

BRIEF OF APPELLEES

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In The United States Court of Appeals

For the Ninth Circuit

SAMUEL H. PALMER and C. A. WHITE,
Partners Doing Business as WESTERN
FENCE & WIRE WORKS, *Appellants*,

vs.

KARL H. KAYE, MATILDA KAYE and
PACIFIC WIRE WORKS Co., a Corpora-
tion, *Appellees*.

No. 12495

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

BRIEF OF APPELLEES

STATEMENT OF FACTS

The complete restatement of all the facts seems unnecessary, but there are so many inaccuracies in the statement in appellants' brief that it seems desirable to deal at some length with some of the facts. They will be discussed at greater length in the several divisions of the argument.

The appellants in the Palmer patent claimed that the screen had "*a practically flat or smooth side*" (R. 324); that "the flat surface" was particularly adapted for screening exceptionally tough or abrasive substances; that the screen comprised "two sets of rods, one set being arranged at right angles to the other set, and each rod being composed of a plurality of *uniformly curved elongated arches* and relatively *short*

and *gradually formed shallow crimps* connecting the arches together” (R. 325). Again, the arches are referred to as “gradual longitudinal arches,” “the terminals of adjacent arches defining relatively shallow crimps” (R. 325). Mr. Palmer, in answer to questions by the court, said (R. 95):

“The arch, the combination of the short crimp and the arch, is what the patent really is.”

It is clear in the evidence that the arch and crimp have long been known to the art (Lippincott, R. 141-142; Dobson, R. 152; Kaye, R. 203). There is nothing new in them. Both were shown in the grill or window screen which was put in the Olympic Hotel in Seattle about the year 1924. Both appear in the Tyler catalogue of 1927 (Defendants’ Exhibit A-36, pages 80, 82, 85, 86, 89, 90, R. 252-255). In 1915 W. S. Potter secured a patent, No. 1139469, on a screen with a substantially flat wearing surface. In this respect it was similar to the claim of the Palmer patent. The Potter screen has crimps in which every other transverse wire rests, and between the crimps there is a comparatively flat connecting link. These crimps are deeper than the crimps in the Palmer patent, but contrary to the statement in appellants’ brief, they are not right-angled crimps. As appears from Figure I and Figure II of the Potter patent (R. 327), they are rounded crimps approaching an angle of 45 degrees. The court will note, however—and this is very important—that those crimps do give very considerable support to the transverse wires in the prevention of shifting and very much more support than the transverse wires receive from the shallower crimps in the Pal-

mer patent. Appellants' brief constantly exaggerates the so-called sharpness of the Potter crimps and overlooks the much greater support which the crimps in the Potter patent give to the transverse wires.

Appellants' brief insists that a defect in the screen made from the Potter patent is the greater likelihood of shifting of the wires. The testimony, however, establishes that if the Potter screen is properly manufactured, it will be a firm screen, and this shifting will not occur (Lippincott, R. 145; Guess, R. 162; Kaye, R. 203, 209). In addition to the support which the wires in the Potter screen receive from the crimps in which they rest, their stability is also secured by the springiness of the wire woven under pressure.

Screens under the Potter patent were not only manufactured and sold prior to the time of the Palmer patent but have been manufactured at all times since and are still being manufactured and sold in large quantities.

The appellees' screens, while not exactly like the Potter screens, are similar (R. 215). The crimps in appellees' screens are somewhat shallower than those in the Potter screens and somewhat less in depth so that the transverse wires passing under the connecting links are pressed up more firmly against the wire above them and held in place. Mr. Kaye's testimony is that they have had no trouble from the shifting of wires in the mesh (R. 203). He has sold his screens in competition with appellants' screens for federal government work (McNary Dam, R. 260; Hungry Horse Dam, R. 266; Coulee Dam, R. 266).

As Palmer himself testified, he did not notify Kaye that he was infringing his patent until appellees' competition became keen and substantial (R. 112). Appellants' patent was applied for in 1934 and granted in 1937. The Palmer screen has been on the market some sixteen years. The business done by appellants is largely in the Northwest. The Palmer screen has not displaced other types of screen. It has not made any large dent in the market. Palmer has not a single licensee (R. 115). Manufacturers have shown no anxiety to get the benefit of his asserted improvements. He has at the present time, after the screen has been on the market for sixteen years, but fourteen employees, including the office girl (R. 99). The other manufacturers, who are very much larger, have done and continue to do the very great bulk of the business. They manufacture the Potter and Galloway screens, all of the "flat top" type. Clearly, there has been no such immediate commercial success of the appellants' screen to indicate any invention or novelty or any superior quality.

We do not agree that the questions listed in appellants' brief on page 2 are the questions presented by the evidence in this case. The evidence does not establish the overall desirability of what is claimed to be the Palmer invention. The word "desirable" is not a word customarily used in patent law, but if used, it must mean desirable in the sense that the merits offset and outweigh the demerits (R. 207). The evidence in this case overwhelmingly established the fact that the Palmer screen was not an overall improvement over the then existing screens and not an overall

improvement over the Potter or the Galloway screens (See the testimony of Joseph E. Lippincott, designer and assistant staff engineer with the Roebling Company, having been with that large manufacturing company for forty-seven years (R. 145)); of Duncan C. Dobson, president of the Ludlow-Saylor Wire Company, which has been in the manufacturing and sale of woven wire screens for fifty-four years (R. 152-153); and Frank M. Guess, manager of the Abbey-Sherer Company of El Monte, California (R. 162). This matter will be referred to later in the discussion of utility.

The evidence also establishes that the arch to which Mr. Palmer refers was well known to screen manufacturers prior to the time of his patent and that it was, so far as practicable, intentionally removed or eliminated by them because they considered it undesirable (R. 144, 161). Since the arch was known to them, it is impossible to assume that they did not also observe the slight lateral support which would be given in the smaller meshes to the transverse wires by the arches. Any mechanic or layman would have observed that readily.

The evidence clearly establishes that the distinguishing features of the "flat top" type of screen are the presence of all the crimps on the under or lower sides of the screens and a comparatively flat surface on the top side (R. 144, 149, 193). These are exactly the claims of the Palmer patent. Under that definition the screens manufactured by appellants and appellees and under the Potter and Galloway patents and by all of the concerns, whose officials testified in the cause, are "flat top" type screens.

Appellants state in their brief that appellees sold their screen under the name of "Pacific 4S Flat Top." This is not true. Appellees' screens are sold as "Pacific 4S" (R. 167). They are claimed to be, and are, under the accepted definition, a "flat top" type of screen. None of the manufacturers mentioned in the evidence sell their screens as "flat tops" because that term is a trade mark belonging to the Abbey-Scherer Company. All of them, however, do refer to their screens as of the "flat top" type (R. 159).

Prior to the development of the "flat top" type of screen, a double crimp type, which has crimps both on the lower and upper surfaces, was common. For certain uses, such as the screening of hard rock, the double crimp style was not so serviceable because it exposed too much of a wearing surface to the sharp rock, but the double crimp type of screen is still in wide use in the smaller meshes, and for some operations it is still better than the "flat top" type.

The Potter screen, which preceded the Palmer screen, had the advantage over previous screens of the comparatively flat wearing surface, giving it, for that reason, a longer life.

It is not true that the sharper bends in the crimps of the Potter screen were a disadvantage if spring steel wire was used, for there are different types of spring steel wire, and, if the proper type is used in the making of the Potter screen, there is no tendency to weakness or fracture of the wire in the crimps. Nor is it true that if properly manufactured, there is a shifting of the cross-wire (R. 203, 162, 145). It is

true that support can be given to the cross-wire by a nick and some lateral support is given *in the smaller meshes* by the slight and unavoidable natural curve between the crimps. This is not necessary, however, as appellees' manufacture proves, if friction between the wires is insured by pressure secured through the springiness in the wire by making the depth of the crimp somewhat less than the diameter of the wire. This pressure itself really produces a slight nick or indentation in the wire (R. 203). The nick, of course, is not patented, was known long before appellants' patent (R. 255-256), and is a device which any mechanic would readily think of. Appellees and Ludlow-Saylor do not employ it because they have found it unnecessary. But there is nothing to prevent them if they wished to do so. It would provide any additional needed lateral support, not only in the $1\frac{1}{2}$ " opening, but also in the larger openings where appellants' arch is flattened out so much as to provide no support.

It is now admitted by the appellants that appellees' screens of the wider meshes do not infringe their patent. This admission was forced by the overwhelming proof that in these wider meshes there was nothing which could possibly be called an arch between the crimps, and there was no support given to the intersecting wires. Although the appellants make screens ranging from $\frac{7}{16}$ " mesh up to as high as 6" (R. 80), they did not, during the course of the four-day trial, introduce in evidence any other than their $1\frac{1}{2}$ " mesh (Plaintiffs' Exhibit 3), except an old worn out screen (Plaintiffs' Exhibit 6). The appellees, on the other hand, whose range runs from $1\frac{1}{4}$ " up to 4"

only, introduced a number of wires from their screens. Contrary to appellants' contention, these wires were fully formed. They were not made particularly for this trial, but were the ends of wires which had been actually used in the manufacture of screens. The fact is that the individual wires demonstrated more clearly their exact shape than the wires in the screens. The witnesses for the appellees testified that appellees did not form-pattern the connecting link in their dies so as to create any arch or bow (R. 206); that in the making of the crimps by the plunger of the punch, a natural arch between the crimps would be formed unless prevented, and steps were taken to eliminate it so far as possible (R. 229, 206). The larger meshed screens clearly demonstrated that any so-called arch had been entirely eliminated. It is true that in the weaving process in appellees' screens, in order to secure pressure between the intersecting wires, a slight distortion upward in the connecting link is produced (R. 199). This, however, is not a result of the *manufacturing* process but a natural result of the *weaving* process and is for the purpose of securing a firm mesh.

In the pleadings and throughout the trial of the case, the appellants contended that all of appellees' screens infringed the Palmer patent. It was not until the argument and motion for a new trial that counsel for appellees confined their claim to the 11½" mesh (Plaintiffs' Exhibit 2). In their brief (page 54), they have now enlarged this claim to include "any other screens having the same form as shown in Palmer's patent," and they urge that the determination of what other screens do infringe should be left to the

Master in fixing damages. This would be conferring on the Master authority to pass on one of the fundamental questions of fact which was submitted to the lower court and when there are no screens of the appellants in evidence except the 1½" mesh. That situation was created by the appellants voluntarily. By express stipulation drawn by counsel for appellants, and approved by the court (R. 13-14), the question of infringement has been tried out and decided against appellants. They did not choose to exhibit to the lower court their screens with the larger meshes—and for obvious reasons. They would have shown beyond all doubt that the appellants' claims were not sustained in those sizes. By stipulation the question of infringement was expressly left with the court. The evidence on that question is in. It cannot be reopened before a Master.

Appellees contend that, although they do not intentionally create any arches and do not desire them, they *naturally* tend to form and are more apparent as the meshes grow smaller. When you arrive at the 1½" mesh, the necessary crimps are so close together and the connecting link between the crimps is so small that it may, on hasty inspection, appear to present a continuous curve. If you are to have crimps, this cannot be avoided. Appellees, however, contend that even in the 1½" mesh there is actually between the adjacent crimps a very small flat connecting link.

There was a dispute at the trial concerning the meaning of the word "crimp." The appellees contended that the crimp included all of that portion of the wire in the indentation made by the plunger below

the plane of the wire at the top of the crimp. For purposes of clarity, it was finally agreed in the lower court that the wire between the crimps as so defined should be termed "connecting link." The appellants endeavored to maintain that the arches extended down the sides of the crimp to the very bottom thereof and that their patent could be described properly as a series of intersecting arches. The evidence shows, however, that this is entirely inaccurate. The arches do not intersect. If they did, there would be produced a sharp point of intersection. The so-called shallow crimp mentioned in their patent would be entirely eliminated. There would be no crimp at all. *This is contrary to the expressed claims of their patent*, which constantly refers to the shallow crimps as something different and distinct from the arches, "Plurality of uniformly curved elongated arches and relatively short and gradually formed shallow crimps connecting the arches together" (R. 325).

Their patent also emphasizes that the arches are *uniformly* curved and elongated. Even in the small meshes, the connecting links in the appellees' screens are not uniformly curved and cannot be properly termed elongated arches. In the larger meshes, it is perfectly obvious that there are no *uniform* curves and nothing which can be properly described as arches in the connecting links between the crimps.

Originally Mr. Palmer testified that in the appellants' manufacturing process, they used dies which predetermined accurately the form of the arch in his screen (R. 76-77). In other words, the appellants intentionally constructed the arch in accordance with the

prepared plans. The appellee, on the contrary, does not, in his manufacturing process, intentionally create any arch or curvature between the crimps. Such arch or curvature as occurs is contrary to his desire and because it cannot be entirely avoided in his method of manufacture.

It is suggested in appellants' brief, although no weight was placed on this matter in the lower court, that screens made under the Potter patent were not sufficiently rough on top to give efficiency in classifying material. There is no evidence, except the interested testimony of Palmer and Essley, to indicate that the Potter screen was in any way defective in this regard. Indeed, the fact that it had been in use for more than thirty-five years, and is still in use without any change in that regard, is the strongest evidence that there is no such disadvantage in its use. The Potter screen is still being made by the largest screen manufacturers in the country, and all of them, including appellants, are striving for a practically flat surface. If a rough surface were desirable at all times, then the Galloway patent, which also preceded the Palmer patent, would be preferable. But, of course, if at any time a rougher surface is desirable, the Potter screen, like the Palmer screen, can be reversed.

All of the manufacturers mentioned in this case now use in their gravel screens spring steel wire of high carbon and high manganese content. All of them, with the exception of Manganese Steel, use the cold press process. Manganese Steel alone employs the heat treatment. There are various types of spring steel wire, and with the proper sort there is no difficulty

in the manufacture of the Galloway screen where the crimps are not abrupt but rounded, or in the manufacture of the Potter screen. The reference to Mr. Lippincott's testimony to support the contrary statement of appellants' counsel misconstrues Lippincott's language; he is there referring to the heat treatment in the manufacture of the wire itself and not in the crimping process (R. 146).

Appellants' counsel, in support of many of their statements, have referred almost exclusively to the testimony of appellant Palmer and his sales manager, Essley. Essley was actively engaged in competing with appellees' products. His experience in connection with the manufacture of woven wire screens was almost entirely as a mere clerk and salesman. The lower court was in a position to determine the credibility of these two interested witnesses. He was entitled to disregard all or any part of their testimony if he saw fit. The appellants produced no independent disinterested witnesses upon the vital points of the case. On the contrary, the appellees did produce three of the most experienced persons in the industry, all totally disconnected with the case and with the appellees.

ARGUMENT

I.

The findings of the lower court are findings of fact which this court will not set aside unless clearly erroneous. The evidence furnishes abundant support to the court's findings.

All of the findings of the lower court to which the appellants are objecting have been held by this court, as well as many other courts, to be findings of fact. *Faulkner v. Gibbs*, 170 F.(2d) 34, at page 37.

Rule 52 (a) of the Federal Rules of Civil Procedure provides as follows:

“Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witness * * *. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein.”

That the appellate court should be slow to set aside the findings of fact of the lower court and should not do so unless they are clearly erroneous is not only well established but is being enforced strictly. *United States v. National Association of Real Estate Boards*, Advanced Opinions of the United States Supreme Court, Volume 94, page 714 at page 719. *Graver Tank and Manufacturing Co. v. Linde Air Products Co.*, Advanced Opinions of the United States Supreme Court, Vol. 94, page 767 at 772. *Pendergrass v. New York Life Insurance Co.* (U.S.C.A. 8, April 3, 1950) 181 F.(2d) 136. *Standard Oil Development Co. v. Marzall* (U.S.C.A. D.C.) 181 F.(2d) 280.

In *United States v. National Association of Real Estate Boards* (*supra*), the court, speaking through Mr. Justice Douglas, decided that it could not overrule the lower court in the light of Rule 52(a) simply because it might disagree with that court on the facts. Justice Douglas said:

“It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent. We are not given those choices, because our mandate is not to set aside findings of fact ‘unless clearly erroneous’.”

In *Pendergrass v. New York Life Insurance Company* (*supra*) the Circuit Court of Appeals of the Seventh Circuit, facing this same question, said:

“The appellants have misconceived the functions of this court, the jurisdiction of which is appellate. In the case of *Cleo Syrup Corporation v. Coca-Cola Co.*, 8 Cir., 139 F.2d 416, 417-418, 150 A.L.R. 1056, we said: ‘* * * This court, upon review, will not retry issues of fact or substitute its judgment with respect to such issues for that of the trial court. *Storley v. Armour & Co.*, 8 Cir., 107 F.2d 499, 513; *Gasifier Mfg. Co. v. General Motors Corporation*, 8 Cir., 138 F.2d 197, 199; *Travelers Mutual Casualty Co. v. Rector*, 8 Cir., 138 F.2d 396, 398. The power of a trial court to decide doubtful issues of fact is not limited to deciding them correctly. *Thompson v. Terminal Shares, Inc.*, 8 Cir., 89 F.2d 652, 655; *Pittsburgh Plate Glass Co. v. National Labor Relations Board*, 8 Cir., 113 F.2d 698, 701 (affirmed 313 U.S. 146, 61 S. Ct. 908, 85 L. Ed. 1251); *Travelers Mutual Casualty Co. v. Rector*,

supra. In a nonjury case, this court may not set aside a finding of fact of a trial court unless there is no substantial evidence to sustain it, unless it is against the clear weight of the evidence, or unless it was induced by an erroneous view of the law. *Aetna Life Ins. Co. v. Kepler*, 8 Cir., 116 F.2d 1, 4, 5; *Gasifier Mfg. Co. v. General Motors Corporation*, 8 Cir., 138 F.2d 197, 199; *Travelers Mutual Casualty Co. v. Rector*, *supra*.'

"There is no logical reason for placing the findings of fact of a trial judge upon a substantially lower level of conclusiveness than the fact findings of a jury of laymen, or those of an administrative agency, which may be set aside only if unsupported by substantial evidence. The findings of fact of a trial court should be accepted by this court as being correct unless it can be clearly demonstrated that they are without adequate evidentiary support or were induced by an erroneous view of the law. The entire responsibility for deciding doubtful fact questions in a nonjury case should be, and we think it is, that of the district court. The existence of any doubt as to whether the trial court or this court is the ultimate trier of fact issues in nonjury cases is, we think, detrimental to the orderly administration of justice, impairs the confidence of litigants and the public in the decisions of the district court, and multiplies the number of appeals in such cases.

"The sufficiency of this evidence to support a trial court's findings and judgment is, of course, a proper question on review. Whether a reviewing court thinks that it would or might have made different findings of fact or have entered a different judgment, had it been the trier of the

facts, is a matter of no consequence. On review, this court should refrain from exercising any of the trial functions conferred by law upon the district courts."

In *Standard Oil Development Co. v. Marzall*, 181 F.(2d) 280, the District of Columbia Court of Appeals had this to say:

"But the scope of our review of the decision of the District Court itself is not an unlimited one. The scope and character of review depend upon the nature of the question reviewed. The problem in the present case, if it can any longer be considered a problem in this court, is whether the District Court's finding of nonpatentability * * * is a finding of fact. If so we may set it aside only if it is clearly erroneous. In *Besser v. Ooms*, 154 F.(2d) 18, this court said: '* * * invention is a question of fact,' from which it followed that, 'A reasonable finding that claims lack invention should not be set aside'."

That court concluded:

"Allowing ourselves the permissible latitude, we cannot say that in the present case the finding of the trial court against patentability is not a reasonable one on the evidence or that it is clearly erroneous. The evidence does not make clear that the combination and improvement admittedly brought about are the product of creative talent which lifts the claims to the level of patentability over and above a prior art which had already disclosed the essentials of the new device."

That the evidence abundantly supports the court's findings we have demonstrated elsewhere in this brief.

Appellants have overlooked the position of this court after a finding of the lower court on the facts that a patent is invalid. On the vital matters in dispute, their references are largely to the testimony of the appellant Palmer and his employee Essley. The appellants produced no independent or expert testimony on those vital points. They disregard the rule that this court will not reverse the lower court on a question of fact if the findings of the lower court have reasonable support in the evidence.

Appellants' counsel bear down heavily on the *prima facie* presumption of validity arising from the grant of a patent. We conceive that this presumption, like other presumptions, loses its force when substantial evidence of invalidity has been introduced. *New York Life Ins. Co. v. Gamer*, 303 U.S. 161, 82 Fed. 726 at 730. Like other presumptions, this presumption is not evidence in itself, and the records of the Supreme Court from 1881 to date have shown that the grant of the patent by the patent office has not been allowed much weight, for 86 % of all patents coming before the Supreme Court in that period of time have been declared invalid. See article *Patent Law: Why Challenge the Court's View of "Invention"?* by W. Houston Kenyon, Jr., American Bar Association Journal, June 1949, Volume 35, page 480. In that article the author says:

"However desirable it would be to have the decision of the Patent Office final upon the point of validity, the experience of almost a century in this country, and of very nearly the same length of time in the courts of Great Britain and Canada, has shown that unhappily we cannot ac-

cord such weight to the decision of a patent examiner. Patents are obtained *ex parte*. An examiner makes the best search he can in the time available to him for examining each of the many cases for which he is responsible. It is greatly to the credit of the Patent Office, and to the chiefs of its sixty-nine patent examining divisions, that in so large a proportion of cases coming before them they do a surprisingly good job. But no action upon a patent application is any better than the search which lies behind it. As the arts today multiply and expand, searching becomes ever more difficult and slow. Searching, by and large, is the responsibility of the junior examiner, of whom hundreds have newly come to work in the Patent Office since the war. The junior is faced with a classification system in which existing United States patents are arranged by subject-matter in some 43,000 subclasses. As his experience grows he makes up his own further unofficial subclasses in the areas of his responsibility. But only United States patents are included in the general classification system—technical journals and foreign patents, though equally applicable on the issue of patentability, are not classified for him. He must in some way keep abreast of the expanding literature and the large numbers of incoming copies of foreign patents, often poorly indexed or not indexed at all, to keep his own private classes up-to-date. On top of this he is necessarily driven by the volume of work pressing upon him, and has a reputation to make with his superiors for efficiency and dispatch of business.

“Under these circumstances it is hardly to be wondered that a certain number of applications go to issue notwithstanding the existence, undis-

covered by the examiner, of some prior patent or publication which seriously impugns novelty
* * *.

“In the years immediately preceding the recent war about 40,000 patents issued annually.”

In addition, and since the decision of the earlier cases laying down the rule as the presumption, the Federal Rules of Civil Procedure have been adopted. After an adverse finding by the lower court on the fact, it is difficult to see how this presumption of validity through the issuance of a patent by the Patent Office can any longer be of effect in the Appellate Court in the face of Rule 52(a). In any event, in this case the evidence overcame the presumption and established the invalidity.

II.

The basic issue is whether the alleged discovery of the Palmer screen constituted invention.

The statute reads (35 U.S.C.A., Section 31):

“Any person who has *invented* or *discovered* any *new and useful* art, machine, manufacture, or composition of matter, or any new and useful improvements thereof, * * * not known or used *by others in this country*, before his invention or discovery thereof, * * * may * * * obtain a patent therefor.”

What is invention has been very difficult to define. In *Cuno Engineering Corporation v. Automatic Devices Corp.*, 314 U.S. 84, 86 L. ed. 58, the Supreme Court of the United States said:

“A new device, however useful it may be, must reveal the flash of creative genius, not merely

the skill of the calling, to constitute a patentable invention."

This court in the recent case of *Gomez v. Granat Bros.*, 177 F.(2d) 266, said:

"The element of invention or discovery is an essential requisite of patentability and 'invention' must at least involve the production of something new and useful and the trend of recent controlling decisions is to the effect that invention involves the operation of the intellect or of something akin to genius as distinguished from mere mechanical skill."

citing many cases. This court then quotes with approval from the Supreme Court in *Cuno Engineering Corp. v. Automatic Devices Corp.* (*supra*) as follows:

"We may concede that the functions performed by Mead's combination were new and useful. But that does not necessarily make the device patentable. Under the statute 35 U.S.C.A., Section 31, Section 4886, the device must not only be 'new and useful,' it must also be an invention or 'discovery'. *Thompson v. Boisselier*, 114 U.S. 1, 11, 5 S. Ct. 1042, 1047, 29 L. Ed. 76. Since *Hotchkiss' Ex'x v. Greenwood*, 11 How. 248, 267, 13 L. Ed. 683, decided in 1851, it has been recognized that if an improvement is to obtain the privileged position of a patent more ingenuity must be involved than the work of a mechanic skilled in the art* * *. That is to say the new device, however useful it may be, must reveal the flash of creative genius not merely the skill of the calling. If it fails, it has not established its right to a private grant on the public domain." (314 U.S. 48, 62 S. Ct. 40)

In the recent case of *Standard Oil Development Co. v.*

Marzall, 181 F.(2d) 280, the District of Columbia Court of Appeals had this to say:

“There is still a further element which must appear, namely, that this combination, though admittedly followed by substantially better results, grew out of that ‘uncommon talent’ which lies at the root of invention in a patentable sense.”

In *Keszthelyi v. Doheny Stone Drill Co.* (1932) 59 F.(2d) 3, this court quoted with approval the following from the opinion of the Supreme Court in *Burt v. Alexander F. Ivory*, 133 U.S. 349 at 358, 33 L. ed. 647:

“It is well settled that not every improvement in an article is patentable. The test is that the improvement must be the product of an original conception, and *a mere carrying forward or more extended application of an original idea—a mere improvement in degree—is not invention.* In *Smith v. Nichols*, 21 Wall. 112, 118, 119, Mr. Justice Swayne, delivering the opinion of the court, said: ‘A patentable invention is a mental result. It must be new, and shown to be of practical utility. Everything within the domain of the conception belongs to him who conceived it. The machine, process, or product is but its material reflex and embodiment. A new idea may be ingrafted upon an old invention, be distinct from the conception which preceded it, and be an improvement. In such case it is patentable. The prior patentee cannot use it without the consent of the improver, and the latter cannot use the original invention without the consent of the former. But a mere carrying forward or new or more extended application of the original thought, a change only in form, proportions, or degree, the substitution of equivalents, doing substan-

tially the same thing in the same way, by substantially the same means, with better results, is not such invention as will sustain a patent. These rules apply alike, whether what preceded was covered by a patent or rested only in public knowledge and use. In neither case can there be an invasion of such domain, and an appropriation of anything found there. In one case everything belongs to the prior patentee; in the other, to the public at large.'

"Neither is it invention to combine old devices into a new article without producing any new mode of operation. *Stimpson v. Woodman*, 10 Wall. 117; *Heald v. Rice*, 104 U.S. 737; *Hall v. Macneale*, 107 U.S. 90, 2 S. Ct. 73.

"In the case of *Klein v. City of Seattle*, 77 Fed. 200, 204, this court said:

" 'A patent must combine utility, novelty, and invention. It may, in fact, embrace utility and novelty in a high degree, and still be only the result of mechanical skill, as distinguished from invention. A person, to be entitled to a patent, must have invented or discovered some new and useful art, machine, manufacture, or composition of matter, or some new and useful improvement thereof. In the language of the supreme court: 'It is not enough that a thing shall be new, in the sense that, in the shape or form in which it is produced, it shall not have been before known, and that it shall be useful, but it must, under the constitution and statute, amount to an invention or discovery.' *Hill v. Wooster*, 132 U.S. 693, 701 10 S. Ct. 228, 231, and authorities there cited. *A mere difference or change in the mechanical construction in the size or form of the thing used, in order to obviate known defects existing in the*

previous devices, although such changes are highly advantageous, and far better and more efficacious and convenient, does not make the improved device patentable. In order to be patentable, it must embody some new idea or principle not before known. It must, as before stated, be a discovery, as distinguished from mere mechanical skill or knowledge. *Atlantic Works v. Brady*, 107 U.S. 192, 200, 2 S. Ct. 225; *Hollister v. Benedict*, 113 U.S. 59, 5 S. Ct. 717; *Thompson v. Boisselier*, 114 U.S. 2, 11, 5 S. Ct. 1042; *Busell Trimmer Co. v. Stevens*, 137 U.S. 423, 433, 11 S. Ct. 150; *Andrews v. Thum*, 15 C.C.A. 67, 67 Fed. 911.'

"The principles stated in these decisions are well settled and require no further discussion."

The case of *Schick Service v. Jones*, 173 F.(2d) 969 (1949), also a decision by this court, is decidedly in point on the facts and in law. There the court again quoted the language just referred to.

In the late case of *Lane-Wells Company v. Johnston*, 181 F.(2d) 707, this court also said:

"We think that the bringing together of the old elements as was done in the Lane patent did not rise to the level of invention. It did not require more than the exercise of mechanical ingenuity of one skilled in the prior art. The ease and simplicity with which the bringing together of the old elements can be accomplished is illustrated by the method of construction of plaintiff's accused device."

See also *Emmett v. Metals Processing Corp.* (C.C.A. 9) 118 F.(2d) 796. In *Picard v. United Aircraft Corp.* (C.C.A. 2, 1942) 128 F.(2d) 632, that court said:

“We cannot, moreover, ignore the fact that the Supreme Court, whose word is final, has for a decade or more shown an increasing disposition to raise the standard of originality necessary for a patent. In this we recognize ‘a pronounced new doctrinal trend’ which it is our ‘duty,’ cautiously to be sure, to follow not to resist.”

In the concurring opinion, Judge Frank refers to the Supreme Court’s decision sustaining a very small percentage of patents. He says that Judge Hand, who delivered the majority opinion, applies a negative test:

“Nothing is an invention which is the product of ‘the slow but inevitable progress * * * through trial and error’ and of ‘the exercise of persistent and intelligent search for improvement’.”

If we apply these principles to the facts in this case, we shall find that they clearly support the lower court’s decision. The trial court said that Palmer’s claims involved no invention. Admittedly, neither the arch nor the crimp were new. Palmer now claims that it is the combination of the arch and crimp which constitutes a discovery and involves invention. But arches, or bows, whatever they may be called, naturally occur in the production of the crimps. As the court said:

“They are a natural by-product of the crimp.”

Unless steps are taken deliberately to remove them, they will occur in every screen. In the manufacture of the Potter screen, which preceded the Palmer patent, arches must have been produced between the crimps, but those arches were deliberately eliminated and the connecting links between the crimps were made flat. The arches were no discovery. Nor was the

combination of the arch and crimp a discovery or new to the art. The testimony of Lippincott, Dobson, Guess and Kaye (R. 213) was to this effect. Lippincott, Dobson and Guess were in no wise connected with this case and were experts with long experience in the manufacture of screens. Lippincott has been connected with the Roebling Company for 47 years in various capacities, and is the most expert man on this matter in their employ. He testified, "The crimping of the wire in a flat top type naturally produces an arch when you do not employ dies to prevent" (R. 140). "That arch, whether a natural arch as a result of coiled wire, or an arch produced by the crimping, was known to the manufacturers of woven wire screens prior to the date of my prints. This bow or arch is a natural result of crimping unless something is done to prevent it. We knew of its existence and did something to prevent it for the reason just mentioned. Other manufacturers knew of it also, but we cannot say just how long previous to the design of our dies. Several years to my knowledge. That arch was removed deliberately by John A. Roebling's Sons Company in order to give longer life to the screen." Mr. Lippincott went on to testify that "At the date of this patent there was nothing new about it. It involves nothing that was not already known by myself at the date of this patent." He also stated that it did not involve any inventive genius or invention; that the Palmer patent did not contain any new and useful features which do not appear in the Potter patent, and that it did not contain anything new or useful that did not also appear in the Galloway patent.

Dobson (R. 152-153), who is president of the Ludlow-Saylor Wire Company, a very large manufacturer of woven wire screens and selling everywhere in the world, testified to the same effect. On cross examination he said (R. 155):

“There were completed woven wire screens containing all the features of the Palmer patent made prior to August 1932.”

Guess, who is manager of the Abbey-Scherer Company, manufacturers of woven wire screens, testified (R. 162):

“The Palmer patent plan of construction does not constitute an advance in the art of screen making. It constituted a retrogression. It does not perform any new function. It does not disclose any ingenuity or any result due to anything other than mechanical skill.”

III.

The claimed essential features of the Palmer patent were either known to the prior art or anticipated by the Potter and Galloway patents.

Palmer claims that the patentable feature of his screen is the shallow crimp, coupled with the uniformly elongated arch. The crimp and the arch had long been known to the art. Defendants' Exhibit A-7, which is a picture of the grill screen placed in the Olympic Hotel in Seattle in 1924, shows a crimp and arch precisely like Palmer's patent. The testimony of Frank J. Seidelhuber (R. 224-226), who has been 44 years in the business in Seattle, is to the effect that he had made screens like that, including gravel screens, 30 or 40 years ago. He says he made them for gravel

screens, for elevator doors, for elevator enclosures and bank grills.

In Defendants' Exhibit A-36, which is a catalogue of the W. S. Tyler Co., of Cleveland, Ohio, manufacturers of all types of woven wire screen and cloth and probably one of the largest manufacturers in the United States (R. 249), there are advertisements of screens with shallow crimps and elongated arches. These crimps and arches are similar to the Palmer patent. They all happen to have the rectangular instead of the square mesh, but that is unimportant since the square mesh is not a distinguishing feature of the Palmer patent. That catalogue was copyrighted in 1927 and has been in the possession of Pacific Wire Works since 1931. The illustrations referred to may be found on the following pages: page 80, lower left hand corner; page 82, left hand side of page, upper corner; page 85 (4 illustrations) two on the right hand upper part of the page and two on the right hand lower part of the page; on page 86 on the left hand side is a group of two illustrations; on page 89 are three groups with two illustrations, and on page 90, there is a grouping of four screens that are not marked by numbers, but the one on the upper left hand corner is a rectangular screen, having a shallow crimp and elongated arch.

Also in evidence are the drawings of Mr. Lippincott, Defendants' Exhibits A-1, A-2 (R. 140), and the testimony of Lippincott (R. 142-148), Dobson (R. 149-155), Plaintiffs' Exhibit 9, Jones (R. 157), and Kaye (R. 203). Admittedly, the Potter and Galloway screens were manufactured prior to the Palmer patent.

The Potter screen contains the crimp and the connecting link between the crimps, and the Galloway patent contains the crimp and the arch or bump in the nature of a reverse crimp.

Again the lower court's finding is amply supported by the evidence.

IV.

The Palmer screen lacks utility

The statute requires that a device or process to be patentable must be both new and useful. The lower court held in this case that the Palmer screen lacked utility. We have previously dealt with the matter of utility in the discussion of the general desirability of the Palmer screen. It is a fair assumption that by utility the lower court meant *overall* utility. It is established, indeed, it is admitted by Palmer himself (R. 110) that the Potter screen will wear longer than the Palmer screen. It is claimed, however, for the Palmer patent that because of the rougher top surface it is more selective in its work of sifting rock and minerals. That a rougher surface was more selective was well known at the time. The Galloway patent had a rougher surface. It carried with it the correlative disadvantage of a lesser life (R. 109).

If the users problem at the time is the need of a rougher surface, any of the flat top type screens can be reversed. As has been discussed, it was also claimed that the Palmer screens secured a firmness through the lateral support of the transverse wire by the arch. The Potter patent, however, furnished much more

lateral support for every second wire and with increased pressure between the upper and lower wire in the connecting link achieved an overall result of as great lateral support for its individual wires as the Palmer screens. The Galloway patent admittedly furnished more lateral support than the Palmer (R. 109). As a matter of fact, the Palmer only provides its support in the smaller opening—none in the larger. In Plaintiffs' Exhibit 31, appellants themselves introduced as a sample of their screen a screen which furnishes no such lateral support. The Galloway patent even combined the rougher surface with the greater lateral support, but both the Galloway and the Palmer screens sacrificed wearing ability to secure any such advantages. Appellants attempted to demonstrate the lack of firmness in the Potter screen by introducing Plaintiffs' Exhibit 5. That screen, however, is not one manufactured by a Potter screen manufacturer. It is one which Palmer himself made for the special purpose of demonstrating its lack of firmness (R. 63). It is a very small mesh and is constructed of small wire. Appellees do not make so small a size in the flat top type. Any screen can be poorly made if it is constructed without sufficient pressure between the intersecting wires. An examination of this screen will show that it is obviously poorly made. It is distorted. It is not made according to the Potter patent, and its weaving is defective. In addition, in Palmer's attempt to demonstrate its weakness, no one knows what pressure he exerted on the screen. Plaintiffs' Exhibit 4, which he also used in the experiment, was also made for

illustrative purposes. Under such circumstances, his attempted experiment proved absolutely nothing.

On the contrary, Defendants' Exhibit A-32 is an Abbey-Scherer Potter screen. An examination will show that it is very firm and cannot be distorted. As previously pointed out on the question of desirability, except for the testimony of Palmer and his employee Essley, the evidence is all to the effect that if properly manufactured, the Potter screen is a tight screen and is efficient. The very best evidence of this is that it is still the one in general use, and it and the Galloway screens are being manufactured by the larger screen manufacturers today (See Palmer's own testimony, R. 87). The Potter patent has expired, but all manufacturers are striving to build flat top type screens along the lines of the Potter patent. Appellants themselves pointed out that the Potter patent is being featured in the Roebling catalogue of 1947. The testimony of all the independent manufacturers who testified also supported the finding of the court that the Palmer screen lacked overall utility.

V.

The description in the Palmer patent was not sufficiently definite to inform the public of the limits of the monopoly asserted.

The statute, U.S.C.A. Ann., Title 35, Section 33, requires:

“* * * a written description of the (claimed invention) and of the manner and process of the making, constructing, compounding and using it in such full, clear, concise and exact terms as

to enable any person skilled in the art or to which it is most nearly connected, to make, construct, compound and use the same * * * and he shall particularly point out and distinctly claim the part, improvement or combination which he claims is his invention or discovery."

The lower court held that the claims of the Palmer patent did not contain a written description of the invention and discovery sufficient to point out particularly, and did not distinctly claim, the part or improvement or combination which Palmer claimed as his invention, so as to inform the public the limits of the monopoly asserted and so that the public may know which features may be used for manufacture without a license and those which may not. The court, in his oral opinion at the end of the case, said (R. 307):

"There is no explicit, certain formula or governing principle for the making of plaintiffs' patented curve or the crimp.

"It is not possible for a stranger, however skilled, to know with certainty how to employ plaintiffs' statement of principles for producing the Palmer patent crimps and arches. Likewise, a stranger to the patent cannot from any statement in the patent claims know exactly how to produce or to avoid producing the patented articles of the plaintiffs.

"Connected with the patent claims or evidence of principles involved in the making of plaintiffs' patented article, there is no exact mathematical or mechanical formula or description to guide the patented manufacture of a specific rock screen with exactly sized wire and with a definitely sized mesh of screen. There is to be

found in plaintiffs' patent claims and evidence no statement of exact depth of the crimps nor of controlling curvature angle or radius of the arches in the plaintiffs' patented screen."

The principle upon which the court relied is well established. In 40 American Jurisprudence, page 585, Section 86, it is stated:

"The purpose of the statutory requirement that the application for a patent shall contain a written description of the invention and discovery, and, in the case of a machine, the principle thereof, and shall particularly point out and distinctly claim the part, improvement or combination which the applicant claims as his invention or discovery is not only that any person skilled in the art to which it appertains may construct and use it after the expiration of the patent, but also to inform the public during the life of the patent of the limits of the monopoly asserted, so that it may be known which features may be safely used or manufactured without a license, and which may not. The monopoly conferred by a patent for an invention does not extend beyond the invention described and explained as the statute requires."

This quotation is amply supported by *Schriber-Schroth Co. v. Cleveland Trust Co.*, 305 U.S. 47, 83 L. Ed. 34.

And in 40 American Jurisprudence, page 587, Section 87, it is stated:

"It is essential to the validity of letters patent that the specifications be full, definite, and specific.

"The purposes of requiring a definite and accurate description of the instrumentality or process are to apprise the public of what the

patentee claims as his invention, to inform the courts as to what they are called upon to construe, and to convey to competing manufacturers and dealers information of exactly what they are bound to avoid. Again, a correct and adequate description or disclosure of a claimed discovery is essential to the validity of a patent, for the reason that such a disclosure is necessary in order to give the public the benefit of the invention after the patent expires. Hence, if the description is so vague and uncertain that no one can tell, except by independent experiments, how to construct the patented device, the patent will be held to be void. The applicant is bound to specify the means or method he uses in a manner so full and exact that anyone skilled in the science to which it appertains can, by using the means he specifies, without any addition to or subtraction from them, produce precisely the result he describes."

The evidence fully supports the findings of the court. The claims of the patent (R. 325-326) lay down nothing but vague and general statements. As the court said, they contain no formula; they do not indicate the depth of the crimp in relation to the size of the wire or the height or length of the arches, or any relationship between the crimps and the arches. When Palmer was on the witness stand, the court again and again asked him to state just how his screen was constructed—to give the court some formula or definite direction for it. Palmer was utterly unable to do so. After much pressing, Palmer told the court that the radius of his crimp was $\frac{2}{3}$ of the radius of his wire. If this is intelligible and true, the

crimp is smaller than the wire, and the wire cannot fit down into the bottom of the crimp. Even if it be true, which appears unlikely, the patent claims contain no such specification. Clearly, the depth and shallowness of the crimp is determined by the sharpness or breadth of the plunger on the press and the arrangements of the female parts of the die. The patent claims contain nothing in this regard. The relation between the diameter of the wire and the depth of the crimp is obviously important. If the crimp is the full diameter of the wire in depth, the screen will not hold together because of lack of pressure between the intersecting wires. Appellees furnished their formula for this important relationship. The depth of their crimps is 84 to 92% the diameter of the wire (R. 187). Kaye (R. 247) testified that a mechanical formula could be stated for the relationship between the crimps and the arches. An examination of the claims would prove to the court that no one reading them could determine with any certainty how the Palmer screen could be constructed or how its alleged patented features could be avoided.

Counsel now claim that the question of the sufficiency of the description was not raised by the pleadings. It seems to us that it was raised by the allegations of the complaint (R. 3-4; V(b)) and the general denials of the amended answer (R. 9; I). Counsel urge that Rule 9c of the Federal Rules of Civil Procedure requires that denial to a pleading of compliance with conditions precedent must be in specific terms. The case cited to support their contention, *Providence Rubber Co. v. Charles Goodyear*,

76 U.S. 566, 19 L. Ed. 788, was decided in 1869. Rule 9c would appear to be intended to cover the pleading and denial of conditions precedent in actions covering contracts and deeds, and it can hardly be extended to cover the requirements in an application for a patent. See Moore's Federal Practice, 2nd Edition, Sec. 9.04, page 1913.

But even if not raised by the pleadings, the question was brought out clearly by the court on the first day of the trial (R. 102-103) and remained a live issue during the trial until the very end. Indeed, counsel voluntarily put his own client back on the stand in rebuttal (R. 272) and quizzed him at great length on this very point. The bulk of that rebuttal is concerned with it. This question was also thoroughly argued by both counsel immediately after the closing of the evidence and again upon the presentation of the findings and conclusions and decree. The point which the appellants are now raising was raised for the first time on the motion for a new trial (R. 47). The lower court held that it was too late to raise it and that the appellants had not been prejudiced.

The new Federal Rules of Civil Procedure, Rule 52(a), read as follows:

“When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but

failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.”

Under this liberal rule the matter was clearly within the discretion of the lower court.

Under this rule, when the evidence is admitted as it was in this case without any objection whatever—indeed a large part of it was provided by appellants—it is not necessary to formally amend the pleadings. Appellants’ counsel seek to escape this sound rule of proper procedure by contending that such evidence was pertinent to the issues of infringement and the prior art. This contention seems unfounded, as the questions of the court were not directed to infringement or prior art, but solely to the formula or directions for making the Palmer screen in accordance with the Palmer patent. That appellants’ counsel fully understood this is shown by an examination of his own client when he voluntarily put him on the witness stand in rebuttal to testify on this very question. Under such circumstances, it cannot fairly be said that counsel did not have full notice of the issue of inadequate disclosure. Even if the evidence were admissible upon the issues suggested, appellants’ coun-

sel could have objected to its admission except for such limited purposes. Counsel was familiar with this procedure and utilized it during the trial (R. 251).

VI.

The screens being manufactured by appellee do not infringe the Palmer patent, if valid.

The lower court so held. In four days of trial on challenge of infringement, appellants introduced only one of their screens (except an old worn out one which was of no use for the purposes of comparison with appellees' screens), the 1½" mesh. Appellees brought in a number of screens and also a number of their wires which had actually been used in the manufacture of screens. None of them showed any uniformly curved intersecting arches. Most of them showed nothing which could properly be termed an arch. All of them had flat connecting links between the crimps. So clear was the evidence that on the motion for a new trial appellants' counsel disclaimed in open court all claims of infringement except as to the 1½" mesh. On this sized mesh appellants introduced Plaintiffs' Exhibit 3, and then endeavored to compare it with Plaintiffs' Exhibit 2, a small screen manufactured by appellees similar to a particular screen produced in 1947. For some reason Palmer did not want one of recent manufacture (R. 55). The Palmer screen (Plaintiffs' Exhibit 3) shows a flattening of the arch. In that screen the arch obviously furnishes no support against lateral pressure. On the other hand, there are several other samples of appellees' screens of the same size. Take, for instance, Defendants' Exhibit A-21. That is a 1½"

mesh $\frac{3}{8}$ " wire and shows clearly the flat connecting link. Plaintiffs' Exhibit 13 is a wire from a screen with the same dimensions, and it shows clearly the flat connecting link. In the $1\frac{1}{2}$ " mesh, however, where the openings are small in relation to the size of the wire, the crimps are necessarily close together. To get the wire up and out of one crimp and down into a closely adjacent crimp, there must necessarily be present a curve upward and a curve downward, and the wire connecting the curve upward and the curve downward will be very short. At a hasty glance, there may appear to be a continuous curve or bow or arch. Can it be contended that this unavoidable bow can be patented so as to exclude all others from using it?

It should be remembered that appellees are not trying to copy appellants' screens. They are not attempting to infringe but to make a different screen under the principle of the Potter patent (R. 215). Their die is not designed "to produce any predetermined curvature"; "it is designed to take it out, not to put it in" (R. 206). Defendants' Exhibits A-30, A-31, A-33 and A-34 show this clearly. Appellees strive to take out any arch because they consider it undesirable (R. 207).

In addition to the fact that the physical shape and form of the wires in appellees' screens generally is different from that of appellants', as pointed out above, the evidence shows that the principle of construction relied upon is also different. Appellant Palmer stated (R. 70), and his patent application claims, that in appellants' screens the transverse wire is held in place because it fits into the curved part of the arch. In

appellees' screens the arch is removed in forming the wire and only the strong resistance to slipping created by the pressure, which the top wire exerts upon the bottom wire, is relied on to prevent displacement of the wires. In other words, the theory of appellants' patent and screen construction is that the force furnished by the arch itself against deformation or displacement of the arch holds the transverse wire in place. The theory of appellees' construction, in which the arch is removed, is that the resistance of the generally straight, but tightly-held-together wires to slipping across one another holds the transverse wires in place. This difference in construction was pointed out and explained by Mr. Kaye in his testimony (R. 187, 197, 203).

Palmer first testified that the radius of his crimp was $\frac{2}{3}$ the diameter of his wire (R. 70). He was understood to be referring to the depth of the crimp. Later he increased the confusion of the court and everyone else by saying that the concave of the arch of the crimp was $\frac{2}{3}$ of the radius of the intersecting wires (R. 276-277). If the depth of appellants' crimp is only about $\frac{2}{3}$ the diameter of the wire, it is obvious that an arch will be necessary. The depth of appellees' crimp is 84 to 92% the diameter of the wire, or just enough to provide pressure by the top wire on the bottom wire and thus insure strong frictional force. To a layman the force relied upon by appellants in their patent and construction is often confused with the different force relied upon by appellees in their construction because of their similar relationship to the form of the wire. In fact, however, as

shown by the evidence, the two forces and two theories of construction are separate and distinct.

CONCLUSION

In conclusion we commend to the court the very lucid oral decision made by the lower court at the conclusion of the trial (R. 306-309), and the court's ruling on the motion for a new trial (R. 44-48). We submit that the lower court's findings have ample support in the evidence on all of the issues determined by the court and that his decision should be affirmed.

Respectfully submitted,

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In The United States Court of Appeals
For the Ninth Circuit

SAMUEL H. PALMER and C. A. WHITE, Partners Doing
Business as WESTERN FENCE & WIRE WORKS,
Appellants,

— vs. —

KARL H. KAYE, MATILDA KAYE and PACIFIC WIRE
WORKS Co., a Corporation,
Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

REPLY BRIEF OF APPELLANTS

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In The United States Court of Appeals

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SAMUEL H. PALMER and C. A. WHITE,
Partners Doing Business as WESTERN
FENCE & WIRE WORKS, *Appellants*,

vs.

KARL H. KAYE, MATILDA KAYE and
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tion, *Appellees*.

No. 12495

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

REPLY BRIEF OF APPELLANTS

1.

Appellees, in effect, admit they are making Palmer type screens.

That appellees are manufacturing industrial wire screens in the form shown in the Palmer patent is implicitly admitted in appellee's brief. They state (Br. 3) that their crimps are not like the Potter screens, that they are shallower than the Potter screen. This is characteristic of the Palmer screen. Also appellees state that (Br. 7) there is an unavoidable natural curve between the crimps; that (Br. 8) in their screens there is a distortion upward in the "connecting link;" that (Br. 9) arches naturally form in their screens and are more apparent as the meshes grow smaller; and that (Br. 11, 38) this bow is unavoidable. They admit (Br. 9) that on the 1½" mesh an inspection shows a continuous curve. Thus it is in ef-

fect conceded by appellees that appellees' screens have an arch as shown by Palmer rather than having straight wires as shown by Potter.

From these statements it is apparent that appellees are not making a Potter screen and do not intend to make a Potter screen. If they were attempting to make a Potter screen they would make a sharp crimp (R. 328, line 84) consisting of deep cups "formed by crimping the bars for their whole diameter out of line at the places of crossings of the straight portions of the intersecting bars" as shown by the Potter patent (R. 328, lines 106-110). A crimp the depth of the whole diameter of the bar permits the straight wires shown by Potter.

Appellees, however, desire to take advantage of the arch and shallow crimp formation shown by Palmer. They sold Palmer's screens for years and built up a substantial business in them (R. 81-82, 237-238). When in 1944 they discontinued buying from Palmer and started manufacturing themselves, they did not make for their customers a new screen different from that which they had previously been supplying. They went right on selling to their customers with no change in description of their screens (R. 237-238). By their own admissions here, they did not manufacture a Potter screen with its straight wire and deep sharp crimps. They made and sold and still make and sell to these customers screens like plaintiffs' Ex. 2 which their customers could not distinguish from Palmer's; screens in which the crimps were shallow, consisting merely of the intersection of adjacent arches.

Appellees' production of Palmer type screens is intentional and not "unavoidable" or "natural."

Indeed, appellees' position now is that this arch and shallow crimp formation is something "natural" which they cannot avoid producing. Throughout this case the word "natural" has been used by appellees at every turn. They introduced evidence to support their claim that the wire as it came from the coil had a curve which they called "natural," completely ignoring the testimony and their own admission that this curve was removed before the manufacturing process commenced (R. 141, 160, 176). They have claimed in testimony and argument that the bending or "crimping" of the wire "naturally" produced an arch in it, ignoring the testimony of their own experts that the manufacturing process will produce whatever shape in the wire that is desired and that an arch will or will not be produced depending on how the dies are adjusted.

These previous contentions of "naturalness" are apparently now abandoned in favor of a new one. Appellees' brief here contends that the arch in their screens (or "distortion upward" as they call it) is "not a result of the manufacturing process but a natural result of the weaving process" (Br. 8). We find this word "natural" in at least six places in appellees' brief (pages 7, 8, 9, 25).

Along with this contention that the Palmer arch is "natural" is the further argument that it is "unavoidable" (Appellees' br. 7, 38).

The fact is that there is nothing whatever "natural"

or "unavoidable" in the production by appellees of screens made in the form shown by the Palmer patent. The form of their screens as finally produced is the result of intentional and careful planning.

David J. Evans, Jr., appellees' witness and head of appellees' heavy gravel screen department, testified that appellees' screens were made by arranging the die for what he thought would be the proper adjustment and pressing out several sample wires which were then woven together to determine whether the screen *as woven* was what they desired. If not, then the adjustments on the die are changed and further samples prepared until the adjustments are such as to produce a finished screen in the form desired (R. 226-229).

From this it is apparent that the final form of appellees' screens is not something produced "unavoidably" or "naturally." Contrary to the statement on page 8 of appellees' brief, the weaving process is a part of the manufacturing process and the final form of the screen is a form which is planned in advance and intentionally produced and the dies are adjusted until they will produce that desired form.

Evans, himself, directly refuted appellees' contention that the arched form of the wire in appellees' screens is something "unavoidable" or "natural" when he testified that he could make a screen with perfectly flat wires as shown in the Potter patent by making the crimp deep enough and sharp enough (R. 229). This is in accord with the testimony of appellees' other witnesses who testified that the wire in the screen can be given any desired shape. It can be made

straight like Potter's wire or arched like Palmer's simply by adjustments to the die. See Lippincott (R. 140, 146) and Guess (R. 160).

When appellees state (Br. 11) that the arch cannot be avoided in their method of manufacture and near the conclusion of their brief (p. 38) ask "can it be contended that the unavoidable bow can be patented," it is obvious, then, that their argument ignores the facts of the case even as established by their own witnesses. The Palmer screen formation is not something unavoidable or natural. Gravel screens were produced for years prior to the Palmer disclosure and there is no evidence of a single screen containing the Palmer formation. Screens can be and are produced in the Potter form with a perfectly straight wire even in very small meshes. See for example the Ludlow-Saylor screen (Pl.'s Ex. 9) and the Abbey-Scherer screen (Def.'s Ex. A-32). It is clear, then, that appellees are making Palmer form screens because they desire to do so and not because it is unavoidable or natural.

3.

Appellees continue to confuse issue with ambiguous language.

Appellees' brief in this court, as did their argument below, avoids detailed reference to the record and applies general terms such as "flat top screens" and "crimp" in a manner which ignores the specific attributes of and differences between the screens here involved. By this language appellees seek to avoid the effect of the precise limitations of the Palmer patent and claims. See for example the last paragraph

of page 5 of appellees' brief, where by use of these terms they imply that the claims of the Palmer patent are the same as Potter and Galloway. On pp. 5 and 6 they speak of an "accepted" definition of "flat top" type screen. There was no such accepted definition. Appellees chose to apply this term to a number of different patented screens. There was no agreement that this term was so applicable and the use of this term certainly does not facilitate a careful and factual disposition of the case. On page 10 appellees state that it was "finally agreed" in the lower court to apply the term "connecting link" to that part of the wire between crimps. There was no such agreement. This was a term coined by the Court below, and it merely led to confusion for the reason that appellees attempted to apply the meaning of the word "crimp" as used in the Potter patent to the Palmer patent where the word "crimp" meant something entirely different. Appellees spoke of the crimp as extending from the top of one arch to the top of the next. Consequently the Court below, we believe, never was clear as to where the "connecting link" began or ended.

With regard to the word "crimp," appellees still misuse it in their brief in this Court, in the same manner pointed out in our opening brief (Appellants' br. pp. 36-38). Moreover they confuse the word "crimp" used in the general sense of meaning any bend in a wire with the word "crimp" as used in describing a particular formation of wire in the Palmer patent. For example, on page 24 of their brief they state "admittedly, neither the arch nor the crimp are new." If they mean by this that before Palmer's inven-

tion it was known that a wire could be bent into either short or long curved portions, then this statement is correct. If they mean that the formation shown by Palmer had been previously used in an industrial wire screen, then the statement is incorrect. Again on page 28 of their brief appellees say that the Potter screen contains "the crimp" and the Galloway patent contains "the crimp and the arch." The use of the word "the" gives the impression that appellees are stating that the Potter and Galloway screens show the same crimp and arch shown by Palmer, which is not correct. Potter and Galloway show bends in the wire to which the words "crimp" or "arch" might be applied but they do not show the wire formation disclosed in the Palmer patent.

Using these words in this ambiguous sense, appellees conclude that the arches were no discovery nor was the combination of the arch and crimp a discovery. Certainly Palmer did not claim to have discovered that wire could be formed with either short or long bends, call them arches or crimps, or whatever you like. His claim is that he was the first to discover that the particular formation shown by him was desirable in an industrial wire screen and he was the first to make a screen with this form.

Appellees speak of the Potter screen as having a "comparatively flat connecting link" (Br. 2). Potter, however, speaks of the wire between crimps as straight (R. 329, line 3 and Claim 1). It is obvious that appellees are attempting to modify the Potter patent so as to make it appear that it shows some arch.

Appellees state that the Potter screen if properly manufactured will not shift (Br. 3). In support of this they cite Lippincott, Guess and Kaye. The Roebling screen concerning which Lippincott testified achieves firmness however by using the nick as a modification of Potter (R. 141, 211, 236). The testimony of Guess does not support appellees' statement. The testimony of Kaye was concerning appellees' screens which appellants contend secure their firmness by using the Palmer formation rather than Potter. As we pointed out in our opening brief (page 29), the Potter screen did not enjoy widespread use until modified.

Appellees refer to Palmer's testimony that the radius of his crimp was $\frac{2}{3}$ of the diameter of the wire (Br. 39), and say that he was understood to be referring to the depth of the crimp. He plainly referred to the radius of his crimp and appellees' misunderstanding of this and their continued talk of the depth of the crimp, which they construed to be from the top of the arches to the bottom of the crimps, caused much of the confusion at the trial.

In discussing this subject of depth of crimp (Br. 39) appellees again use the word "crimp" ambiguously. As defined in the Palmer patent the crimp is only that part of the wire which is concave toward the smooth side of the screen. This "crimp" is very short, extending only across a part of the bottom of the intersecting wire and is of almost negligible depth. Consequently when appellees speak of a crimp with a depth of 84 to 92% of the wire, they are using that term in a sense entirely different from that in

which it is used in the Palmer patent. Appellees are, in fact, using the term here, as they did below, in an attempt to make it appear that most, if not all, of the arched portion of the wire is merely part of the crimp.

This discussion on page 39 of appellees' brief has an interesting aspect, however, even though based on an erroneous interpretation of Palmer's testimony and on an ambiguous use of the term "crimp." Appellees state that if the depth of the crimp is $\frac{2}{3}$ of the diameter of the wire, it is obvious that an arch will be necessary. They then say that their crimp is of a depth of 84 to 92% of the diameter of the wire. It is, we point out, just as obvious that an arch will be necessary in the latter case as in the former. Potter secured his straight wire by "crimping the bars for their whole diameter out of line" (R. 328, lines 106-110).

4.

Appellees do not show that anyone prior to Palmer conceived the desirability of or built a screen with the Palmer formation.

Appellees' brief cites nothing in the prior art bearing on the fact that Palmer was the first to discover the desirability of the formation shown by him and to produce such a screen, other than the evidence discussed in our opening brief. Appellees make much of the window screen at the Olympic Hotel and Frank J. Seidelhuber's testimony concerning it. But as Seidelhuber admitted, this screen was only the old basket weave, over and under, the same on both sides (R. 226). Seidelhuber's testimony that he made screens

like that 30 or 40 years ago, if it has any credence, can refer only to this basket weave. We believe further that a perusal of all of Seidelhuber's testimony will show that his thinking was so disjointed and unresponsive and his testimony in such generalities as to give it little, if any, weight. Furthermore, the Olympic Hotel window screen was never used as an industrial wire screen and does not indicate any discovery that any particular formation of wire would be suitable in an industrial screen (R. 175).

Likewise, the Tyler screens (Def.'s Ex. A-36) were the old basket weave, the same on both sides, and did not show a screen with the Palmer formation (R. 264). Tyler made some screens with oblong openings which gave them a different look but they were still the old double crimp. Moreover, these Tyler screens have no bearing on the prior art in this case as they were admitted solely for the purpose of construing the claims of the patent (R. 249-252).

We repeat again, therefore, that there is no showing in this case that anyone prior to Palmer ever conceived that a screen of Palmer's formation would be desirable for industrial purposes and there is no showing that such a screen was ever previously built.

Lippincott and Dobson testified that they knew that a screen could be made with an arch similar to Palmer's but neither built such a screen and Lippincott testified that he thought it not desirable. These men were unable to see what Palmer saw, that an industrial wire screen with intersecting arches has definite advantages.

To constitute anticipation there must be a showing

that a similar screen previously was reduced to practice and a witness's conclusions alone, based upon memory and unsupported by other evidence, are not sufficient. *Konet v. Haskins* (U.S.C.C.P.A.) 179 F. (2d) 1003; *Miessner v. Hoschke* (C.A.D.C.) 131 F. (2d) 865. Mere general conclusions by appellees' witnesses here that the Palmer screen was not new certainly would not be sufficient to show anticipation.

5.

Appellees' argument on "utility" is really argument on comparative desirability.

Appellees argue that the Palmer screen lacks utility (Br. 28). This argument is based on the requirement of the statute that a device to be patented must be useful. Appellees, however, misconstrue the requirement of utility which, as we pointed out in our opening brief (pp. 51-52), is only that the device will operate as set forth in the patent. There is no requirement that it supplant everything or anything else in the art.

The argument on utility made by appellees is really one as to comparative desirability between the Palmer and Potter screens, or that the Palmer screen offers no advantages. If, as appellees argue, the Potter screen is the more desirable, and the Palmer screen has no advantages, then why do not appellees make the Potter screen? They admit in their brief, as we summarized in the first paragraph of this brief, that they are not making the Potter screen. Yet the head of their manufacturing department, Evans, states that they could make the screens with the deep crimp and straight wires of the Potter patent if they so

desired. Obviously, they have found it more desirable to use the arch formation with the shallow crimp shown by Palmer. Roeblings, likewise, now find it desirable to produce screens with the Palmer formation as shown by Def.'s Ex. A-5. Lippincott recognized that the Palmer formation was less severe on the wire (R. 144-145) and appellees admit that it furnishes additional lateral support to the transverse wires (Appellees' br. p. 5). We believe that there can be no doubt in this case of desirability of the Palmer screen and that it produces beneficial results in use.

6.

Any of appellees' screens containing the arches intersecting in shallow crimps infringe Palmer patent.

Appellees state (page 7) that appellants admit that appellees' screens of the wider meshes do not infringe. This is not true. Also, appellees state (page 37) that appellants' counsel, on motion for new trial, disclaimed in open court all claims of infringement except as to the 1½" mesh. This likewise is not true.

The position of appellants throughout this case has been that appellees are infringing as shown by Pl.'s Ex. 2 and by the testimony of Palmer and Essley that they have seen a large number of appellees' screens with the same arch formation contained in Ex. 2 in users' places of business. Appellants were able to secure only the one exhibit of appellees' screen for introduction into evidence because the other screens were being used by customers and could not readily be removed to Court. Having secured only one of appellees' screens for use as an exhibit, appellants in-

troduced one of their own screens of the same size for comparison. The reason why appellants did not introduce the full line of their screens was that they had not secured as exhibits any comparable screens of appellees.

Appellees introduced some screens of other sizes together with a number of wires, many only partially formed. These wires are not representative of the shape of the wire in the finished screen because, as appellees admit, the wires are deformed in the weaving process. It may be, of course, that appellees are making some screens that do not infringe appellants' patent. Appellants' position is that any screen sold by appellees which contains the arches intersecting in shallow crimps as shown in Pl.'s Ex. 2, is an infringement. It is obvious from Ex. 2, and from the testimony, that appellees are selling some screens of this type and, therefore, are infringing. We insist that any screen, no matter what the size, that shows the same formation of wire as found in Pl.'s Ex. 2 is an infringement. The task of determining how many screens of this type have been produced by appellees is that of the District Court and Master in determining damages. At this stage of the case the only issue before the Court is whether there has been infringement of a valid patent. Pl.'s Ex. 2 and the testimony establish that there has been infringement.

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